SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 101

UNITED STATES, APPELLANT,

vs.

WARD BAKING CO., ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

INDEX

(File endoresement omitted)

1 IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

Civil No. 4735-Civ-J

UNITED STATES OF AMERICA, *Plaintiff*,

v.

WARD BAKING COMPANY, AMERICAN BAKERIES COMPANY, DERST BAKING COMPANY, FLOWERS BAKING COMPANY, INC. and SOUTHERN BAKERIES COMPANY, *Defendants*.

Complaint—Filed July 21, 1961

The United States of America, plaintiff, by its attorneys, acting under the direction of the Attorney General of the United States, brings this action against the hereinafter named defendants in two counts, and complains and alleges as follows:

I

JURISDICTION AND VENUE

1. This complaint is filed and this action is instituted against the defendants, under the False Claims Act (31 U.S.C. §§ 231-233) by the United States of America in its capacity as purchaser of bakery products for use by United States Naval installations, for forfeitures, and, in addition, double the amount of damages suffered by it due to defendants' acts (Count I), and, under Section 4 of the Act of Congress of July 2, 1890 (c. 647, 26 Stat. 209 as amended), entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, to prevent and restrain continuing violations by the defendants as hereinafter alleged of Section 1 of said Act (15 U.S.C. § 1) (Count II).

2 2. Inasmuch as all defendants are corporations, no defendant is in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States.

3. All the defendants, except Derst Baking Company, maintain offices, transact business and are found within the Southern District of Florida.

II

Definition of Terms

4. As used in this complaint:

(a) "Bakery products" means bread and rolls.

(b) "Jacksonville area" means the area within (1) the northern part of the State of Florida, and (2) the southeastern part of the State of Georgia.

III

The Defendants

5. Ward Baking Company (hereinafter called "Ward") is made a defendant herein. Said defendant is a corporation organized and existing under the laws of the State of New York with its principal place of business in New York, New York. It owns and operates baking plants in Jacksonville, Florida and various other States.

6. American Bakeries Company (hereinafter called "American") is made a defendant herein. Said defendant is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in Chicago, Illinois. It ows and operates baking plants in Jacksonville, Florida and various other States.

7. Derst Baking Company (hereinafter called "Derst") is made a defendant herein. Said defendant is a corporation organized and existing under the laws of the State of Georgia with its principal place of business in Savannah, Georgia. It owns and operates a baking plant in Savannah, Georgia.

3 8. Flowers Baking Company, Inc. (hereinafter called "Flowers") is made a defendant herein. Said defendant is a corporation organized and existing under the laws of the State of Georgia with its principal place of business in Thomasville, Georgia. It owns and operates a

baking plant in Jacksonville, Florida, and a baking plant in Thomasville, Georgia.

9. Southern Bakeries Company (hereinafter called "Southern") is made a defendant herein. Said defendant is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in Atlanta, Georgia. It owns and operates baking plants in Jacksonville, Florida and various other States.

10. The acts alleged in this complaint to have been done by each of the defendants were authorized, ordered, or done by the officers, agents, employees, or representatives of each defendant while actively engaged in the managemnt, direction, or control of its affairs.

11. During the period covered by this complaint the United States of America, through its Naval installations in the Jacksonville area, purchased bakery products for use by said installations. All during said period, plaintiff purchased bakery products pursuant to sealed, competitive bidding procedures; and in accordance with this practice, and for the purpose of letting contracts, it called for bids from suppliers, including defendants, for supplying bakery products to plaintiff. Bakery products were purchased by plaintiff during the aforesaid period pursuant to contracts awarded in response to such bidding procedures, and all purchases of bakery products complained of herein were from defendants.

IV

Offenses Charged

Count I

12. The United States of America, in its capacity as purchaser of bakery products for use by United
4 States Naval installations in the Jacksonville area, brings this suit under Sections 3491 and 3492 of the Revised Statutes (31 U.S.C. §§ 232-233), to recover forfeitures and damages provided by Section 3490 and 5438 of the Revised Statutes (31 U.S.C. § 231), commonly known as the False Claims Act.

13. Beginning at least as early as 1957, the exact date to plaintiff unknown, the defendants, together with others to plaintiff unknown, knowingly combined, conspired and agreed to defraud and injure the United States of America by obtaining or aiding to obtain the payment or allowance of false, fraudulent or fictitious claims under contracts awarded them for the sale of bakery products and did make, cause to be made, or presented or caused to be presented, for payment or approval, such false claims during said period.

14. In furtherance of said combination and conspiracy, defendants unlawfully agreed, among other things:

(a) To allocate among themselves the business of supplying bakery products to United States Naval installations in the Jacksonville area; and

(b) To submit noncompetitive, collusive, and rigged bids and price quotations for supplying bakery products to United States Naval installations in the Jacksonville area.

15. During the period of time covered by this complaint, the defendants, and others to plaintiff unknown, for the purpose of forming and effectuating the aforesaid combination and conspiracy, and in furtherance thereof, have done, among other things, the following:

(a) Representatives of the defendants held meetings and conferred by telephone for the purpose of allocating among the defendants the business of supplying bakery products to United States Naval installations in the Jacksonville area. The business was allocated in such a manner as to provide each defendant with the business for a designated quarterly period of the year. When invitations to bid were received from the Naval installations in the Jacksonville area, said representatives would again meet and confer and the representatives of the defendant designated for the particular period would declare the prices which that defendant intended to bid. The others would agree to bid higher prices and thus protect the bid of the designated low bidder.

(b) Throughout the period covered by this complaint, the defendants submitted bids on bakery products to United States Naval installations in the Jacksonville area, which had no knowledge of the combination and conspiracy hereinabove alleged, and pursuant to such bids, defendants were awarded contracts to supply bakery products to said Naval installations.

16. Pursuant to said combination and conspiracy, and as a result of the acts done in furtherance thereof, defendants have been awarded contracts for the sale of bakery products to said Naval installations and have received payments thereunder, on the basis of the bids which they submitted and which they had falsely or fraudulently represented to be bona fide, independent and competitive, and not the product of any collusion or agreement between the bidders, and the prices of which bids they further had falsely or fraudulently represented to be competitive; whereas in fact known to defendants but unknown to plaintiff, said bids submitted were sham and collusive and not the result of open competition, and prices therefor were arbitrary and noncompetitive.

17. With respect to each such contract awarded for the supply of bakery products during the aforesaid period of the conspiracy, the defendant to which such contract was awarded presented and caused to be presented to
6 plaintiff for payment or approval by it numerous claims, knowing such claims to be false or fraudulent in that each was based on a contract which had been falsely and fraudulently procured by reason of the aforesaid bidding practices.

18. As a result of the presentment to it of the aforesaid false or fraudulent claims, and without knowledge thereof, plaintiff has paid the false or fraudulent claims to defendants.

19. As a result of the illegal combination and conspiracy and the defendants' acts in furtherance thereof, plaintiff has been compelled to pay higher prices for bakery products than would have been the case but for the illegal conduct complained of herein, and plaintiff has been financi-

ally damaged by defendants, the amount of which is presently undetermined.

WHEREFORE, plaintiff:

(a) Demands judgment against each defendant for forfeitures and, in addition, double the amount of the damages it has sustained, together with the costs of suit as provided in Sections 3490, 3491, 3492 and 5438 of the Revised Statutes (31 U.S.C. §§ 231-233).

(b) Prays that it recover such other amounts and have such other and further relief as the Court shall deem just.

7 COUNT II

20. The United States of America brings this suit against the defendants under Section 4 of the Act of Congress of July 2, 1890 (c. 647, 26 Stat. 209, as amended), entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, in order to prevent and restrain continuing violations by the defendants as hereinafter alleged of Section 1 of said Act (15 U.S.C. § 1).

21. The defendants operate the largest bakeries in the Jacksonville area and, during the period covered by this complaint, said defendants baked a substantial amount of the bakery products sold in said area. In 1959 total sales by the defendants of bakery products in the Jacksonville area amounted to approximately $11,000,000.

22. During the period of time covered by this complaint, each of the defendants operated a baking plant in the Jacksonville area. The defendants Ward, American and Southern owned and/or operated trucks which regularly and frequently delivered bread from their bakeries in Jacksonville, Florida to wholesale accounts, including United States Naval installations, located in the State of Georgia. Thus, there was a regular, continuous and substantial flow of bakery products in interstate commerce between the bakeries of the defendants Ward, American and Southern in Jacksonville, Florida and their wholesale accounts and United States Naval installations located in Georgia.

23. Beginning in or about the year 1957, the exact date to plaintiff unknown, defendants, together with others unknown, have engaged in a combination and conspiracy in unreasonable restraint of interestate trade and commerce in the sale of bakery products, in violation of Section 1 of the Sherman Act.

8

24. The aforesaid combination and conspiracy has consisted of a continuing agreement, understanding, and concert of action among the defendants and other persons to the plaintiff unknown, the substantial terms of which were:

(a) To allocate among themselves the business of supplying bakery products to United States Naval installations in the Jacksonville area; and

(b) To submit noncompetitive, collusive, and rigged bids and price quotations for supplying bakery products to United States Naval installations in the Jacksonville area.

25. During the period of time covered by this complaint, the defendants and other persons to plaintiff unknown, for the purpose of forming and effectuating the aforesaid combination and conspiracy, and in furtherance thereof, have done, among other things, those acts which are alleged in paragraph 15(a) of Count I hereof, the allegations of which are realleged in this paragraph, with like effect as if herein fully repeated.

26. The effects of the aforesaid combination and conspiracy were that:

(a) Competition among the defendants in the sale and distribution of bakery products to United States Naval installations in the Jacksonville area has been suppressed and eliminated, and

(b) United States Naval installations in the Jacksonville area engaged in the purchase of bakery products have been denied the right to receive competitive sealed bids as required by law and have been forced to pay artificially-fixed prices for bakery products.

27. Since at least 1957, plaintiff has purchased substantial quantities of bakery products from defendants for use at United States Naval installations in the Jacksonville area. In purchasing said bakery products, plaintiff, in most instances has invited formal, sealed, competitive bids from prospective suppliers, and, with minor exceptions, has accepted the price offered by the lowest responsible bidder.

28. As a result of the illegal combination and conspiracy alleged herein, plaintiff has been led and induced by defendants to make contract awards on bids solicited by it during the period covered by this complaint, at prices fixed by said illegal combination and conspiracy, and plaintiff has been denied thereby the benefit of competition in prices for bakery products. By the operation of defendants' agreements and concert of action herein alleged, plaintiff has been compelled to pay higher prices than would have been the case but for the violations of the antitrust laws herein alleged.

WHEREFORE, plaintiff prays:

(a) That the aforesaid combination and conspiracy agreements and arrangements be adjudged by the Court to be in unreasonable restraint of the trade and commerce described in this complaint and in violation of Section 1 of the Sherman Act; and that the Court adjudge and decree that the defendants have combined and conspired to restrain interestate trade and commerce in violation of Section 1 of the Sherman Act.

(b) That the defendants be enjoined from (1) allocating among themselves the business of supplying bakery products to United States Naval installations in the
10 Jacksonville area and (2) from submitting non-competitive collusive, and rigged bids and price quotations for supplying bakery products to United States Naval installations in the Jacksonville area.

(c) That the plaintiff have such further, general, and different relief as the nature of the case may require and the Court may deem appropriate in the premises.

(d) That the plaintiff recover its taxable costs.

/s/ HENRY M. STUCKEY
Attorney, Department of Justice

/s/ ROBERT F. KENNEDY
Attorney General

/s/ LEE LOEVINGER
Assistant Attorney General

/s/ MARGARET H. BRASS
Attorney, Department of Justice

/s/ DONALD C. LEHMAN
Ass't. United States Attorney

(File endoresement omitted)

19 IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

Civil No. 4735-Civ.-J.

(Title omitted)

Answer of Defendant Southern Bakeries Company—Filed October 11, 1961

Comes now defendant SOUTHERN BAKERIES COMPANY, by its attorneys duly authorized, and files this its answer to plaintiff's Complaint and respectfully shows:

FIRST DEFENSE

1.

Defendant Southern Bakeries Company moves the Court to dismiss Count I and Count II of the plaintiff's Complaint because the same fails to state a claim against this defendant upon which relief can be granted.

SECOND DEFENSE

2.

In criminal proceeding #11,677-Cr.-J. in this Honorable Court this defendant was charged with the identical offense which the plaintiff is herein charging again against this defendant and plaintiff is now seeking another forfeiture in Count I of the present Complaint; and this defendant shows that in said former criminal proceedings it did enter before this Honorable Court a plea of nolo contendere, neither admitting nor denying the charges but not contesting the same, without putting the plaintiff and this defendant to the expense of protracted litigation; and that this defendant through the action of this Court had a fine of $5,000 levied against it to be forfeited in favor of the plaintiff, and that this defendant did, pursuant to said judgment of this Court of April 11, 1961, pay said fine of $5,000 in full to the plaintiff. By this present proceeding involving the same parties, and involving the same offenses, this defendant is being put in double jeopardy and Count I of plaintiff's Complaint should abate as plaintiff is merely seeking a second forfeiture and fine against this defendant.

THIRD DEFENSE

The claims in this Complaint against this defendant are barred by applicable statutes of limitation.

FOURTH DEFENSE

3.

The following paragraphs of plaintiff's Complaint are admitted: 1, 2 and 9. However, defendant denies any right in plaintiff to proceed under the Acts of Congress recited in paragraph one of the Complaint.

4.

The allegations of the following paragraphs of plaintiff's Complaint are denied: 10, 13, 14(a) and (b), 15(a) and (b), 17, 18, 19, 23, 24(a) and (b), 25, 26(a) and (b), and 28.

5.

This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations

contained in the following numbered paragraphs of the Complaint: 4, 5, 6, 7, 8, and 20. This defendant denies any right in plaintiff to proceed under the Acts of Congress recited in paragraph twenty of the Complaint.

6.

Answering paragraph 3 of plaintiff's Complaint this defendant shows that it maintains an office, transacts business and is found within the southern district of Florida; and that it is without knowledge or information sufficient to form a belief as to the allegations of paragraph 3 in respect to the other defendants.

7.

Answering paragraph 11 of plaintiff's Complaint this defendant admits that during the period covered by the Complaint the plaintiff, through its Naval installations in the Jacksonville area, purchased bakery products for use by such installations and by others; all other allegations of paragraph 11 are denied, except that bakery products were purchased from this defendant by plaintiff during the aforesaid period.

8.

Answering paragraph 12 of plaintiff's Complaint this defendant admits that plaintiff claims that it is bringing said action as alleged, but denies that it has any right to do so.

9.

Answering paragraph 16 of plaintiff's Complaint this defendant admits that it entered into contracts for the sale of bakery products to said Jacksonville Naval installations and received payments therefor; but this defendant denies all other allegations of paragraph 16 as alleged.

10.

Answering paragraph 21 of the plaintiff's Complaint being a part of Count II, this defendant shows that it operates a bakery in Jacksonville and did so during the period covered by the Complaint and baked and sold bakery prod-

ucts. This defendant is without knowledge or information sufficient to form a belief as to all other allegations of paragraph 21 of plaintiff's Complaint.

11.

Answering paragraph 22 of plaintiff's Complaint, this defendant avers that during the period of time covered by the Complaint it operated a baking plant in Jacksonville; that it operated trucks which regularly delivered bread from this defendant's bakery in Jacksonville to wholesale accounts, including U. S. Naval installations located in Jacksonville, and sporadically to Naval installations at Glynco, Georgia. This defendant is without knowledge or information sufficient to form a belief concerning the allegations as to the other defendants. All other allegations of paragraph 22 of said Complaint are denied.

12.

Answering paragraph 27 of plaintiff's Complaint this defendant avers that plaintiff purchased substantial quantities of bakery products from this defendant for use
23 at U. S. Naval installations in the Jacksonville area; and is without knowledge or information concerning the allegations as to the other defendants; and denies all other allegations of paragraph 27.

WHEREFORE, the defendant, Southern Bakeries Company, demands a trial by jury of the issues in this cause and demands judgment dismissing the Complaint and awarding it the costs and expenses of the defense of this action.

/s/ JOHN H. BOMAN, JR.

/s/ CRENSHAW, HANSELL, WARE, BRANDON & DORSEY
Attorneys for the defendant Southern Bakeries Company
310 Fulton Federal Building
Atlanta 3, Georgia.

CERTIFICATE OF SERVICE

(Omitted in printing)

(File endoresement omitted)

28 IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

No. 4735-Civil-J

(Title omitted)

Answer of the Defendant Flowers Baking Company, Inc.— Filed October 13, 1961

Flowers Baking Company, Inc., a corporation, one of the defendants herein, by its undersigned attorneys, files this its answer to the complaint and says:

FIRST DEFENSE

I

As to paragraph 1 of said Complaint, this defendant admits that the plaintiff seeks to invoke the jurisdiction of this Court pursuant to the statutory provisions referred to therein but states that it is without knowledge or information to form a belief as to the capacity in which the plaintiff sues. This defendant further denies that the plaintiff can invoke the jurisdiction of this Court pursuant to the False Claims Act and said Sherman Act referred to therein.

II

As to paragraph 2 of said Complaint, this defendant admits that it is a corporation but states that it is without knowledge as to the type of business organization under which other defendants do business.

29 III

As to paragraph 3 of said Complaint, this defendant admits that it maintains offices and transacts business within the Southern District of Florida but states that it is without knowledge of the other allegations set forth there.

IV

This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs 4, 5, 6, 7 and 9 of said Complaint.

V

As to paragraph 8 of said Complaint, this defendant admits the allegations therein set forth.

VI

This defendant denies the allegations of paragraph 10 of said Complaint.

VII

As to paragraph 11 of said Complaint, this defendant admits that the plaintiff purchased bakery goods for naval installations in the Jacksonville area but it denies each and every other allegation set forth in said paragraph except that it sold bakery goods to the plaintiff during the period covered by said Complaint, but this defendant is without knowledge as to whether all suppliers of bakery goods are defendants herein.

VIII

As to paragraph 12 under Count One of said Complaint, this defendant is without knowledge or information as to the truth of the allegations, but this defendant denies that plaintiff can invoke the jurisdiction of this Court under the False Claims Act therein cited.

30

IX

This defendant denies the allegations of paragraphs 13, 14 and 15 under Count One of said Complaint.

X

This defendant denies the allegations of paragraph 16 under Count One of said Complaint but admits that it has been awarded contracts for the sale of bakery products to naval installations and has received payment thereunder.

XI

This defendant denies the allegations of paragraphs 17, 18 and 19 under Count One of said Complaint.

XII

As to paragraph 20 under Count Two of said Complaint, this defendant admits that the same is brought pursuant

to the statute therein set forth but states that it is without knowledge or information sufficient to form a belief as to the capacity in which plaintiff sues. This defendant further denies that plaintiff can invoke the jurisdiction of this Court under Section 4 of the Sherman Act.

XIII

As to paragraph 21 under Count Two of said Complaint, this defendant is without knowledge of the volume of bakery products sold by other defendants in the Jacksonville area during 1959 and has no information sufficient to form a belief as to the truth of the allegations therein set forth.

XIV

As to paragraph 22 of Count Two of said Complaint, this defendant admits that it operates a baking plant in the Jacksonville area as alleged but it is without knowledge as to the alleged interstate operations by other de-
31 fendants, and this defendant specifically denies that it has been engaged in interstate commerce in the sale of bakery products in the Jacksonville area.

XV

This defendant denies the allegations of paragraphs 23, 24, 25 and 26 under Count Two of said Complaint.

XVI

As to paragraph 27 under Count Two of said Complaint, this defendant says that it sold quantities of bakery goods to the plaintiff for use in naval installations in the northern part of the State of Florida but it is without knowledge of purchases by the plaintiff from other defendants. This defendant denies all other allegations of said paragraph 27.

XVII

This defendant denies the allegations of paragraph 28 under Count Two of said Complaint.

SECOND DEFENSE

The Complaint herein fails to state a claim against the defendant Flowers Baking Company, Inc. upon which relief can be granted.

THIRD DEFENSE

The claims in said Complaint against the defendant Flowers Baking Company, Inc. are barred by applicable statutes of limitation.

FOURTH DEFENSE

As to Count One of said Complaint, a Grand Jury duly empaneled by the United States District Court for the Southern District of Florida, Jacksonville Division, did on the 6th day of March, 1961, return to this Court an indictment against this defendant (Case No. 11,677-J Criminal) charging it with a crime against the United States for and on account of the same acts and transactions as in Count One charged and set forth. On April 11, 1961 this defendant tendered to this Court a plea of nolo contendere to said indictment, which plea was accepted by this Court, and upon said plea sentence was passed and imposed upon this defendant. The plaintiff by instituting and prosecuting Count One of this Complaint seeks to recover a forfeiture and penalty and by so doing subjects this defendant to double jeopardy for the same offense in violation of rights guaranteed to it by the Fifth Amendment to the Constitution of the United States.

WHEREFORE the defendant Flowers Baking Company, Inc. demands a trial by jury and judgment dismissing the Complaint and awarding it the costs and expenses of the defense of this action.

/s/ JOHN W. BALL

/s/ DAVISSON F. DUNLAP

Attorneys for defendant Flowers Banking Company, Inc.

ADAIR, ULMER, MURCHISON, KENT & ASHBY
1215 Barnett Bank Building
Jacksonville, Florida

Of Counsel for Flowers Baking Company, Inc.

CERTIFICATE OF SERVICE

(Omitted in printing)

(File endorsement omitted)

33 IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

(Title omitted)

Answer of Defendant, American Bakeries Company—Filed October 13, 1961

American Bakeries Company, one of the defendants herein, subject to its motion to dismiss the complaint filed herein, makes this its answer to plaintiff's complaint and for cause thereof says:

FIRST DEFENSE—COUNT ONE

1.

This defendant admits the allegations contained in paragraphs 1 through 9 inclusive of this complaint.

2.

This defendant denies the allegations contained in paragraph 10 of the complaint herein.

3.

Answering paragraph 11 of the complaint, this defendant admits that during the period covered by this complaint, United States of America through its Naval installations in the Jacksonville area, (as that term is defined), purchased bakery products for use by said installations and admits that all such purchases of bakery products complained of here were from one or more of the defendants in this action. In all other respects the allegations of paragraph 11 are each and all denied.

34 4.

Paragraph 12 of the complaint is admitted.

5.

This defendant denies each and every allegation contained in paragraph 13.

6.

This defendant denies each and every allegation contained in paragraph 14.

7.

This defendant denies each and every allegation contained in paragraph 15.

8.

Answering paragraph 16, this defendant admits that it did enter into some contracts for the sale of bakery products to the Naval installations described and that it did receive payment for bakery products delivered under these contracts. This defendant is informed and believes that its co-defendants, Ward Baking Company, Derst Baking Company, Flowers Baking Company, Inc. and Southern Bakeries Company, have entered into like contracts for other periods and that they have in like manner received payments for deliveries made thereunder. American Bakeries Company asserts that each of the contracts described which it entered into consists of a written request for proposal, a written proposal submitted by it at the invitation of plaintiff and a written acceptance thereof by these Naval installations on behalf of plaintiff. None of the proposals thereof made by this defendant contained false, fraudulent or fictitious representations nor were these proposals in any manner falsely nor fraudulently represented to the United States by this defendant. Except as expressly admitted, all allegations of paragraph 16 are denied.

35

9.

In response to paragraph 17 of the complaint, this defendant admits that with respect to the contracts awarded it for the supply of bakery products it submitted to plaintiff claims for approval and payment. This defendant denies all other allegations of said paragraph and expressly denies that any of the claims so submitted were false or fraudulent or that any of these claims were based upon contracts which were falsely or fraudulently procured.

10.

In response to paragraph 18, this defendant admits that the claims which it presented were paid but it denies that

any such claims were false or fraudulent. This defendant further admits that when plaintiff made payment of this defendant's claims, it had no knowledge of any falsity or fraud therein because none existed.

11.

Each and every allegation of paragraph 19 is denied.

FIRST DEFENSE—COUNT II.

12.

Paragraphs 20, 21 and 22 of plaintiff's complaint are admitted.

13.

This defendant denies each and every allegation contained in paragraph 23 of plaintiff's complaint.

14.

This defendant denies each and every allegation of paragraph 24 of plaintiff's complaint.

15.

This defendant in answer to paragraph 25 of plaintiff's complaint denies each and every allegation therein
36 contained including the allegations of paragraph 15(a) of Count One of this complaint which are adopted and re-alleged by reference.

16.

Each and every allegation of paragraph 26 of plaintiff's complaint is denied.

17.

In answering paragraph 27, this defendant admits that since 1957 plaintiff has purchased substantial quantities of bakery products from defendants for use at United States Naval installations in the Jacksonville area. All other allegations of paragraph 27 of the complaint are denied.

18.

This defendant denies each and every allegation contained in paragraph 28 of plaintiff's complaint.

SECOND DEFENSE—COUNT I

19.

For a second defense to count one of plaintiff's complaint (paragraph 1 through 19 and prayers following

paragraph 19) American Bakeries Company asserts that as a matter of law, the facts and things complained of do not, even if true as alleged, constitute a claim upon which the relief of double damages and forfeitures can be granted under the False Claims Act (31 U.S.C., § 231-233) or upon which any other relief sought can be granted.

SECOND DEFENSE—COUNT II

For a second defense to count two of plaintiff's complaint, this defendant asserts that as a matter of law plaintiff is not entitled to have the equitable relief prayed nor any other relief of an equitable nature against this defendant by virtue of the facts and things alleged and set out in count two of the complaint (paragraphs 20 through 28 and prayers following 28) for the reason that it is nowhere alleged that the combination or conspiracy described is still operative and in effect or that the
37 defendants or any of them are presently engaged in doing or threatening to do any acts pursuant or in furtherance of the alleged conspiracy at the present time.

WHEREFORE, having fully answered, defendant, American Bakeries Company, demands trial by jury of the legal issues made and prays that it be discharged.

/s/ FRED KENT
/s/ DAVISSON F. DUNLAP
/s/ JOHN BALL
/s/ M. H. BLACKSHEAR, JR.
Attorneys for Defendant
American Bakeries Company

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Georgia Building
Atlanta, Georgia
Of Counsel for Defendant,
American Bakeries Company

41 IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

Criminal No. 11,677-J

UNITED STATES OF AMERICA, *Plaintiff*,

v.

WARD BAKING COMPANY,
AMERICAN BAKERIES COMPANY,
DERST BAKING COMPANY,
FLOWERS BAKING COMPANY, INC., and
SOUTHERN BAKERIES COMPANY,
Defendants.

Indictment—Filed March 6, 1961

The Grand Jury Charges:

I

DEFINITION OF TERMS

1. As used herein, the term:

(a) "Bakery products" means bread and rolls.

(b) "Jacksonville area" means the area within (1) the Northern part of the State of Florida, and (2) the Southeastern part of the State of Georgia.

II

THE DEFENDANTS

2. Ward Baking Company (hereinafter called "Ward") is hereby indicted and made a defendant herein. Said defendant is a corporation organized and existing under the laws of the State of New York with its principal place of business in New York, New York. It owns and operates a baking plant in Jacksonville, Florida, and in various other States.

3. American Bakeries Company (hereinafter called "American") is hereby indicted and made a defendant

herein. Said defendant is a corporation organized
42 and existing under the laws of the State of Delaware with its principal place of business in Chicago, Illinois. It owns and operates a baking plant in Jacksonville, Florida, and in various other States.

4. Derst Baking Company (hereinafter called "Derst") is hereby indicted and made a defendant herein. Said defendant is a corporation organized and existing under the laws of the State of Georgia with its principal place of business in Savannah, Georgia. It owns and operates a baking plant in Savannah, Georgia.

5. Flowers Baking Company, Inc. (hereinafter called "Flowers") is hereby indicted and made a defendant herein. Said defendant is a corporation organized and existing under the laws of the State of Georgia with its principal place of business in Thomasville, Georgia. It owns and operates a baking plant in Jacksonville, Florida, and a baking plant in Thomasville, Georgia.

6. Southern Bakeries Company (hereinafter called "Southern") is hereby indicted and made a defendant herein. Said defendant is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in Atlanta, Georgia. It owns and operates a baking plant in Jacksonville, Florida, and in various other States.

7. Whenever in this indictment reference is made to any act, deed or transaction on the part of any defendant corporation, such allegation shall be deemed to mean that the directors, officers or agents of such corporation authorized, ordered, or did such act, deed or transaction, for or on behalf of such defendant corporation while actively engaged in the management, direction and control of its affairs.

III

Nature of Trade and Commerce

8. The defendants operate the largest bakeries in the Jacksonville area and during the period covered by this indictment, said defendants baked approximately 90% of

the bakery products sold in said area. In 1959 total sales by the defendants of bakery products in the Jacksonville area amounted to approximately $11,000,000.

43 9. During the period of time covered by this indictment, the defendants purchased substantial amounts of flour, sugar, yeast and other ingredients used by them in the production of bakery products from suppliers located in States other than Florida and Georgia. Said ingredients were shipped by said suppliers from their places of business outside Florida and Georgia to the bakeries of the defendants in the States of Florida and Georgia.

10. During the period of time covered by this indictment, each of the defendants operated a baking plant in the Jacksonville area. The defendants Ward, Southern and American owned and operated trucks which regularly and frequently delivered bread from their bakeries in Jacksonville, Florida to wholesale accounts, including United States Government Naval installations, located in the State of Georgia. Thus, there was a regular, continuous and substantial flow of bakery products in interstate commerce between the bakeries of the defendants Ward, Southern and American in Jacksonville, Florida and their wholesale accounts and United States Government Naval installations located in Georgia.

IV

Offense Charged

11. Beginning in or about September 1957, the exact date being to the Grand Jurors unknown, and continuing thereafter up to and including the date of the return of this indictment, the defendants named herein, together with others to the Grand Jurors unknown, have engaged in a combination and conspiracy in unreasonable restraint of the hereinbefore described trade and commerce in violation of Section 1 of the Act of Congress of July 2, 1890, as amended, entitled, "An Act to protect trade and commerce against unlawful restraints and monopolies" (26 Stat. 209, 15 U.S.C. § 1), commonly known as the Sherman Act.

12. The aforesaid combination and conspiracy has consisted of a continuing agreement, understanding,
44 and concert of action among the defendants, and others to the Grand Jurors unknown, the substantial terms of which have been and are:

(a) To allocate among themselves the business of supplying bakery products to Federal Naval installations in the Jacksonville area; and

(b) To submit noncompetitive, collusive, and rigged bids and price quotations for supplying bakery products to Federal Naval installations in the Jacksonville area.

13. During the period of time covered by this indictment, and for the purpose of forming and effectuating the aforesaid combination and conspiracy, the defendants and others to the Grand Jurors unknown, by agreement and concerted action, have done those things which, as hereinbefore alleged, they conspired and agreed to do.

Effects

14. The effects of the aforesaid combination and conspiracy have been and are that:

(a) Competition among the defendants in the sale and distribution of bakery products to Federal Naval installations in the Jacksonville area has been suppressed and eliminated, and

(b) Federal Naval installations in the Jacksonville area engaged in the purchase of bakery products have been denied the right to receive competitive sealed bids as required by law and have been forced to pay artificially-fixed prices for bakery products.

VI

Jurisdiction and Venue

15. The combination and conspiracy charged in this indictment has been entered into and carried out in
45 part within the Southern District of Florida where the defendants, except defendant Derst, own and

operate baking plants. During the period of time covered by this indictment and within the five years next preceding the return thereof, the defendants, pursuant to said combination and conspiracy, have committed within the Southern District of Florida many of the acts herein charged.

Dated:

A TRUE BILL

/s/ HENRY M. STUCKEY
Henry M. Stuckey
Attorney, Department of Justice

/s/ ROBERT L. FINCH
Foreman

/s/ W. WALLACE KIRKPATRICK
Acting Assistant Attorney General

/s/ CHARLES L. WHITTINGHILL
Attorney, Department of Justice

/s/ JOHN L. BRIGGS
Asst. United States Attorney

(File endorsement omitted)

46 IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

(Title omitted)

Answer of the Defendant, Ward Baking Company—Filed October 13, 1961

Ward Baking Company, a corporation, one of the defendants herein, by its undersigned attorneys, files this, its answer to the Complaint, and says:

FIRST DEFENSE

I

This defendant denies the allegations in Paragraph 1 of the Complaint, except it admits that the plaintiff seeks to invoke the jurisdiction of this court pursuant to the

statutory provisions referred to herein and states that it is without knowledge or information sufficient to form a belief as to the capacity in which plaintiff sues. This defendant further denies that the plaintiff can invoke jurisdiction of this court pursuant to the False Claims Act (31 U.S.C. Secs. 231-233) or to Sec. 4 of the Sherman Act (C 647, 26 Stat. 209 as amended).

II

This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraphs 2, 3, 4, 5, 6, 7, 8 and 9 of the complaint, except it admits those allegations insofar as they relate to it.

47

III

This defendant denies the allegations in Paragraph 10 of the Complaint.

IV

This defendant denies the allegations in Paragraph 11 of the Complaint except that it admits that during the period covered by the Complaint the plaintiff purchased bakery products for use by its naval installations in the Jacksonville area and this defendant is without knowledge as to whether all purchases of bakery products were from the defendants in this action.

V

This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegation in Paragraph 12, except that it denies the plaintiff can invoke the jurisdiction of this court pursuant to the False Claims Act (31 U.S.C. Secs. 231, 232 and 233).

VI

This defendant denies the allegations in Paragraphs 13, 14, 15, 16, 17, 18 and 19 of the Complaint, except it admits that during the said period it sold bakery products to naval installations in the Jacksonville area pursuant to contracts and received payment therefor.

VII

This defendant denies the allegations in Paragraph 20 of the Complaint, except that it admits the plaintiff seeks to invoke the jurisdiction of this court pursuant to the statutory provision referred to therein and states that it is without knowledge or information sufficient to form a belief as to the capacity in which the plaintiff sues. The defendant further denies that plaintiff can invoke the jurisdiction of this court pursuant to Section 4 of the Sherman Act (C 647 26 Stat. 209).

48

VIII

This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 21, except that it admits during the period covered by the Complaint it operated a bakery in Jacksonville, Florida and sold bakery products in that area.

IX

This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 22 of the Complaint, except that it admits that it has delivered bread from its bakery in Jacksonville, Florida to wholesale accounts, including United States naval installations located in the State of Georgia.

X

This defendant denies the allegations in Paragraphs 23, 24, 25 and 26 of the Complaint.

XI

This defendant denies the allegations in Paragraph 27 of the Complaint except it admits that since 1957 plaintiff has purchased bakery products from defendants for use at United States naval installations in the Jacksonville area.

XII

This defendant denies the allegations in Paragraph 28 of the Complaint.

SECOND DEFENSE

Complaint fails to state a claim against this defendant upon which relief can be granted as to Count I and Count II of the Complaint.

THIRD DEFENSE

The claims asserted in this Complaint against the defendant, Ward Baking Company, are barred by applicable statutes of limitation.

49

FOURTH DEFENSE

As to Count I of this Complaint, the defendant, Ward Baking Company, by institution of this proceeding has been placed in double jeopardy.

In former criminal proceedings, Case No. 11677 Cr.-J, in this court, this defendant pleaded nolo contendere to a grand jury indictment which recited the same acts and transactions set forth in Count I of the Complaint.

The court accepted the plea of nolo contendere and levied a fine of $5,000.00 against the defendant in favor of the United States of America, the plaintiff in this cause.

The plaintiff, in seeking to recover another forfeiture and penalty against this defendant under Count I of the Complaint is placing the defendant in double jeopardy in violation of Article V of the United States Constitution.

WHEREFORE, the defendant, Ward Baking Company, demands a trial by jury of the issues in this cause and demands judgment dismissing the complaint and awarding it the costs and expenses of the defense of this action.

FRED H. KENT
DAVISSON F. DUNLAP
Adair, Ulmer, Murchison, Kent & Ashby
Attorneys for the defendant,
Ward Baking Company
1215 Barnett Bank Building
Jacksonville 2, Florida

CERTIFICATE OF SERVICE

(Omitted in printing)

(File endorsement omitted)

51 IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

(Title omitted)

Answer of Derst Baking Company—Filed October 16, 1961

COMES NOW DERST BAKING COMPANY, one of the defendants in captioned cause, and for answer respectfully shows to the Court that for want of sufficient information this defendant cannot answer any part of the complaint as it relates to any of the other defendants, but as the complaint relates to it, Derst Baking Company shows the following:

JURISDICTION AND VENUE

-1-

Answering Paragraph 1, defendant denies venue and jurisdiction as to it in both Counts I and II.

-2-

Answering Paragraph 2, defendant admits that it is a corporation.

-3-

Answering Paragraph 3, defendant shows that it does not maintain an office, it does not transact business, and it is not found within the Southern District of Florida.

52 DEFINITION OF TERMS

-4-

No answer is required to Paragraph 4.

THE DEFENDANTS

-5-

For want of sufficient information, defendant can neither admit nor deny the allegations of Paragraph 5.

-6-

For want of sufficient information, defendant can neither admit nor deny the allegations of Paragraph 6.

-7-

Defendant admits the allegations of Paragraph 7.

-8-

For want of sufficient information, defendant can neither admit nor deny the allegations of Paragraph 8.

-9-

For want of sufficient information, defendant can neither admit nor deny the allegations of Paragraph 9.

-10-

Defendant denies the allegations of Paragraph 10.

-11-

Answering Paragraph 11, defendant admits that the United States of America, through its naval installation at Glynco, Georgia, purchased bakery products for use at that installation. This defendant further admits that during the period referred to in the complaint, on occasions this defendant sold bakery goods to said installation at Glynco, Georgia. This defendant denies all the remaining allegations of Paragraph 11.

53

First Defense to Count I

-12-

The allegations of Paragraph 12 do not require answer, except to state that the United States of America states no cause of action against this defendant in Count I.

-13-

Defendant denies the allegations of Paragraph 13.

-14-

Defendant denies the allegations of Paragraph 14, including sub-paragraphs 14 (a) and 14 (b).

-15-

Defendant denies the allegations of Paragraph 15, including sub-paragraphs 15 (a) and 15 (b).

-16-

Defendant denies the allegations of Paragraph 16.

-17-

Answering the allegations of Paragraph 17, this defendant admits that it did during said period of time sell bakery goods on occasion to the United States naval instal-
54 lation at Glynco, Georgia and that it did present bills for payment of such goods delivered. All other allegations of Paragraph 17 are denied.

-18-

Answering the allegations of Paragraph 18, this defendant admits that it was paid for the goods that it sold to the United States naval installation as aforesaid, but expressly denies all other allegations of Paragraph 18.

-19-

Defendant denies the allegations of Paragraph 19.

First Defense to Count II

-20-

The allegations of Paragraph 20 do not require answer, however this defendant shows that the United States of America states no cause of action against this defendant in Count II.

-21-

Answering the allegations of Paragraph 21, this defendant shows that it does not maintain any office, it is not transacting any business, it is not found and it does not sell any bakery products within the geographical limits of the State of Florida. As previously stated, defendant, during the period covered by Count II, did upon occasion sell bakery goods to the United States naval installation at Glynco, Georgia. All other allegations of Paragraph 21 are denied.

-22-

As the allegations of Paragraph 22 relate to any
55 other defendants, for want of sufficient information this defendant can neither admit nor deny such alle-

gations. However. as such allegations may relate to this defendant, they are denied except that this defendant admits it operates a single bakery, and that is located in Savannah, Georgia.

-23-

This defendant denies the allegations of Paragraph 23.

-24-

This defendant denies the allegations of Paragraph 24, and sub-paragraphs 24(a) and 24(b).

-25-

Defendant denies the allegations of Paragraph 25.

-26-

Defendant denies the allegations of Paragraph 26 and sub-paragraphs 26 (a) and 26 (b) thereof.

-27-

Answering Paragraph 27, this defendant admits that during the period covered in said complaint, upon occasions, it has sold bakery products to the United States naval installation at Glynco, Georgia. However, all other allegations of Paragraph 27 are denied.

-28-

This defendant denies the allegations of Paragraph 28.

56

SECOND DEFENSE TO COUNT I

-29-

The allegations of Count I of the complaint fail to state a claim against this defendant upon which relief can be granted.

THIRD DEFENSE TO COUNT I

-30-

The allegations of Count I against this defendant are penal in nature. Therefore, Count I of the complaint should be dismissed as against this defendant because on the Sixth day of March, 1961, a grand jury impaneled by

the United States District Court for the Southern District of Florida, Jacksonville Division, indicted this defendant, charging it with a crime against the United States based upon the same acts and transactions alleged in Count I. This defendant, on April 11, 1961, entered a plea of nolo contendere to the indictment. The plea was accepted and a sentence was passed and imposed upon this defendant by the Court, this defendant paying a fine of $2,500. The United States of America, by Count I of the complaint, seeks to subject this defendant to double jeopardy for the same offense in violation of this defendant's constitutional rights under the Constitution of the United States.

SECOND DEFENSE TO COUNT II

-31-

The allegations of Count II of the complaint fail to state a claim against this defendant upon which relief can be granted.

WHEREFORE, this defendant having fully answered the allegations of both Count I and Count II of the com-
57 plaint, this defendant demands trial by jury of the issues subject to jury trial and prays that it be hence discharged without costs.

/s/ JOHN B. MILLER,
Attorney for Derst Baking Company, Defendant

Of Counsel

HITCH, MILLER & BECKMANN
P. O. Box 2126
Savannah, Georgia

CERTIFICATE OF SERVICE

(Omitted in printing)

(File endorsement omitted)

251 IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

(Title omitted)

Motion of Ward Baking Company, et al. for Entry of Consent Judgment—Filed May 8, 1962

The Defendants, Ward Baking Company, American Bakeries Company, Derst Baking Company, Flowers Baking Company, Inc. and Southern Bakeries Company, before any testimony has been taken in the above captioned cause, move the court to enter against them a consent judgment as to Count Two of the Plaintiff's complaint, in accordance with the form of the proposed judgment annexed hereto and marked Exhibit "A", and for grounds of said motion, the said Defendants state:

1. The Plaintiff filed a complaint in this cause on July 21, 1961 against the said Defendants.

2. The said complaint contained in Count Two thereof the following allegations concerning alleged violations of the antitrust laws on the part of these Defendants and the effects of the said violations, and a prayer for relief to prevent and restrain the said violations:

"24. The aforesaid combination and conspiracy has consisted of a continuing agreement, understanding, and concert of action among the defendants and other persons to the plaintiff unknown, the substantial terms of which were:

(a) To allocate among themselves the business of supplying bakery products to United States Naval in-
252 stallations in the Jacksonville area; and

(b) To submit noncompetitive, collusive, and rigged bids and price quotations for supplying bakery products to United States Naval installations in the Jacksonville area.

"26. The effects of the aforesaid combination and conspiracy were that:

(a) Competition among the defendants in the sale and distribution of bakery products to United States Naval installations in the Jacksonville area has been suppressed and eliminated, and

(b) United States Naval installations in the Jacksonville area engaged in the purchase of bakery products have been denied the right to receive competitive sealed bids as required by law and have been forced to pay artificially-fixed prices for bakery products.

"28. As a result of the illegal combination and conspiracy alleged herein, plaintiff has been led and induced by defendants to make contract awards on bids solicited by it during the period covered by this complaint, at prices fixed by said illegal combination and conspiracy, and plaintiff has been denied thereby the benefit of competition in prices for bakery products. By the operation of defendants' agreements and concert of action herein alleged, plaintiff has been compelled to pay higher prices than would have been the case but for the violations of the antitrust laws herein alleged.

"WHEREFORE, plaintiff prays:

(a) That the aforesaid combination and conspiracy, agreements and arrangements be adjudged by the
253 Court to be in unreasonable restraint of the trade and commerce described in this complaint and in violation of Section 1 of the Sherman Act; and that the Court adjudge and decree that the defendants have combined and conspired to restrain interstate trade and commerce in violation of Section 1 of the Sherman Act.

(b) That the defendants be enjoined from (1) allocating among themselves the business of supplying bakery products to United States Naval installations in the Jacksonville area and (2) from submitting noncompetitive collusive, and rigged bids and price quotations for supplying bakery products to United States Naval installations in the Jacksonville area.

(c) That the plaintiff have such further, general, and different relief as the nature of the case may require and the Court may deem appropriate in the premises.

(d) That the plaintiff recover its taxable costs."

3. In the said complaint the plaintiff defined the term "Bakery Products" and "Jacksonville Area" as used in the complaint, as follows:

"4. As used in this complaint:

(a) "Bakery products' means bread and rolls.

(b) "Jacksonville area" means the area within (1) the northern part of the State of Florida, and (2) the southeastern part of the State of Georgia."

4. The form of the proposed judgment tendered as Exhibit "A" attached to this motion is framed in the language used by the Plaintiff in its prayer for relief and provides the Plaintiff, the United States Government, with every safeguard needed to accomplish the only proper purpose of Count Two of the Plaintiff's complaint, namely,
254 the prevention and restraint of violations of the anti-trust laws as set forth in Count Two of said complaint.

5. That the Plaintiff and Defendants have settled Count One of the complaint by agreement between them, and therefore all issues between the moving Defendants and the Plaintiff stand resolved and there remains no just reason for delaying the entry of the final judgment against these Defendants in accordance with the proposed form of judgment annexed to this motion as Exhibit "A".

6. By entry of the proposed consent judgment, both the Plaintiff and Defendants will be spared the ordeal of a costly and protracted trial and the entry of such consent judgment will be in accordance with the Congressional policy to encourage consent judgments and decrees in anti-trust cases wherein the government is plaintiff and private parties are defendants. See *Twin Ports Oil Co.* v. *Pure Oil Co., et al.* (D.C.D.Minn. 1939) 26 F. Supp. 366.

/s/ JOHN W. BALL of
Ulmer, Murchison, Kent, Ashby & Ball
850 Florida National Bank Building
Jacksonvill, Florida
Attorneys for Flowers Baking Company, Inc.

/s/ M. H. Blackshear, Jr. of
King & Spalding
434 Trust Company of Georgia
Building
Atlanta 3, Georgia

Fred H. Kent
/s/ Davisson F. Dunlap of
Ulmer, Murchison, Kent, Ashby
& Ball
850 Florida National Bank
Building
Jacksonville, Florida
Attorneys for Ward Baking
Company

255 /s/ John H. Boman, Jr. of
Hansell, Post, Gardner, Brandon
& Dorsey
310 Fulton Federal Building
Atlanta 3, Georgia
Attorneys for Southern
Bakeries Company

/s/ John B. Miller of
Hitch, Miller, Beckmann &
Simpson
400 Georgia State Bank
Building
Savannah, Georgia
Attorneys for Derst Baking
Company

Certificate of Service

(Omitted in printing)

256 Exhibit "A" to Motion

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

Civil No. 4735-Civ.-J

UNITED STATES OF AMERICA, *Plaintiff*,

-VS-

WARD BAKING COMPANY, AMERICAN BAKERIES COMPANY, DERST BAKING COMPANY, FLOWERS BAKING COMPANY, INC., and SOUTHERN BAKERIES COMPANY, *Defendants*.

FINAL JUDGMENT—COUNT II

Plaintiff, United States of America, having filed its complaint herein in two Counts on July 21, 1961, and final judgment having been entered on Count I of the complaint and the defendants by their respective attorneys having filed a Motion for Entry of a Judgment in conformity with the relief sought by the plaintiff in its complaint, without trial or adjudication of any of the issues of fact or law herein and before the taking of any testimony; it is hereby

ORDERED, ADJUDGED AND DECREED upon Count II of the complaint as follows:

I

This Court has jurisdiction of the subject matter hereof and of the parties consenting hereto and Count II of the complaint states a claim upon which relief may be granted against the defendants under § 1 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies" commonly known as the Sherman Act, as amended.

257 II

As used in this final judgment:

(a) "Bakery products" means bread and rolls.

(b) "Jacksonville area" means the area within (1) the northern part of the State of Florida, and (2) the southeastern part of the State of Georgia.

III

The provisions of this final judgment applicable to any defendant shall apply also to each of its subsidiaries, successors, assigns, officers, directors, agents and employees, and to all other persons in active concert or participation with such defendant who shall have received actual notice of this final judgment by personal service or otherwise.

IV

Each of the defendants is enjoined and restrained from directly or indirectly entering into, adhering to, or claiming or maintaining any right under any contract, agreement, arrangement, understanding, plan or program with any other person to:

(a) Submit noncompetitive, collusive or rigged bids, or quotations for supplying bakery products to United States Naval installations in the Jacksonville area, or

(b) Allocate, divide or rotate the business of supplying bakery products to United States Naval installations in the Jacksonville area.

V

Each defendant is enjoined and restrained from directly or indirectly disclosing to or exchanging with any seller of bakery products the intention to submit or not submit a bid or quotation for supplying bakery products to United States Naval installations in the Jacksonville area, the fact that such a bid or quotation has or has not been submitted or made, or the content or terms of any such bid or quotation.

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VI

Each defendant is ordered and directed for a period of three years after the date of entry of this final judgment, to submit a sworn statement in the form set forth in the Appendix hereto with each bid for bakery products submitted to any Naval installation in the Jacksonville area (unless such installation requires the submission of a different type of sworn statement to the same effect), such sworn statement to be signed by the person actually responsible for the preparation of said bid.

VII

For the purpose of securing compliance with this final judgment duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to any defendant made to its principal office, be permitted, subject to any legally recognized privilege and with the right of said defendant to have counsel present:

(a) Reasonable access during the office hours of said defendant, to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of said defendant, relating to the supplying of bakery products to any Naval installation in the Jacksonville area; and

(b) Subject to the reasonable convenience of said defendant, and without restraint or interference, to interview officers and employees of said defendant, who may have counsel present, regarding such matters contained in this final judgment.

Upon such written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, the said defendant shall submit such written reports with respect to supplying bakery products to any Naval installation in the Jacksonville area.

259 No information obtained by the means permitted in this Section shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the plaintiff except in the course of legal proceedings for the purpose of securing compliance with this final judgment in which the United States is a party or as otherwise required by law.

VIII

Jurisdiction is retained for the purpose of enabling any of the parties to this final judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this final judgment, for the modification or

termination of any of the provisions thereof, for the enforcement of compliance therewith, and punishment of violations thereof.

DATED at Jacksonville, Florida _____, 1962.

_____
United States District Judge

260 **APPENDIX**

Affidavit

The undersigned hereby certifies to his best knowledge and belief that:

(1) The bid to _____

(name of recipient of bid) dated _____

has not been prepared by _____
(name of defendant) in collusion with any other seller of bakery products, and

(2) The prices, terms or conditions of said bid have not been communicated by the undersigned nor by any employee or agent of _____
(name of defendant), to any other seller of bakery products and will not be communicated to any such seller prior to the official opening of said bid,

in violation of the Final Judgment in Civil No. 4735-Civ.-J entered by the United States District Court for the Southern District of Florida, Jacksonville Division, on _____, 1962.

Dated: _____, 1962

_____
Signature of person responsible for the preparation of the bid

(Filed endorsement omitted)

262 IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

(Title omitted)

Stipulation and Order Dismissing Count I of the Complaint—May 8, 1962

Derst Baking Company having been dismissed by the Court from Count I of the complaint, and $44,000 having been paid to plaintiff in full settlement of Count I, it is stipulated and agreed by and between the plaintiff and the remaining defendants, by their attorneys, that Count I of the complaint be and it is hereby dismissed as to Ward Baking Company, American Bakeries Company, Flowers Baking Company, Inc. and Southern Bakeries Company, with prejudice.

263

/s/ HENRY M. STUCKEY
Attorney, Department of Justice

/s/ JOHN W. BALL
Ulmer, Murchison, Kent, Ashby & Ball
850 Florida National Bank Building
Jacksonville, Florida
Attorneys for Flowers Baking Company Inc.

/s/ M. H. BLACKSHEAR, JR.
King & Spalding
434 Trust Company of Georgia Building
Atlanta 3, Georgia
Attorneys for American Bakeries Company

/s/ JOHN B. MILLER
Hitch, Miller, Beckmann & Simpson
400 Georgia State Bank Building
Savannah, Georgia
Attorneys for Derst Baking Company

/s/ Davisson F. Dunlap
Ulmer, Murchison, Kent, Ashby & Ball
850 Florida National Bank Building
Jacksonville, Florida
Attorneys for Ward Baking Company

/s/ John H. Boman, Jr.
Crenshal, Hansell, Ware, Brandon & Dorsey
310 Fulton Federal Building
Atlanta 3, Georgia
Attorneys for Southern Bakeries Company

So Ordered this 8th day of May 1962
Bryan Simpson
Chief Judge, United States
District Court

(Filed endorsement omitted)

264 IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

(Title omitted)

Order on Motion of Defendant Derst Baking Company to Quash Service and to Dismiss Complaint as to Count I—May 8, 1962

Defendant, Derst Baking Company, having filed its motion to quash service as to Count I and to dismiss the complaint as to Count I;

This motion having come on for hearing before me this date; and after considering arguments of Counsel thereon;

It Is Considered, Ordered and Adjudged that defendant, Derst Baking Company's motion to quash service as to Count I and to dismiss the complaint as to Count I be and it is hereby granted and Count I of the complaint be and it is hereby dismissed as against defendant, Derst Baking Company.

So ordered this 8th day of May, 1962.

Bryan Simpson
Judge, USDC, Southern District
of Florida

(Filed endorsement omitted)

265 IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

(Title omitted)

Order to Show Cause—May 8, 1962

This cause coming on for hearing for conference on all remaining issues upon the joint motion of attorneys for plaintiff and defendants, and attorneys for the plaintiff and defendants being present, and the defendants having filed a motion for entry of a consent judgment and having served the same on attorney for the plaintiff, and having tendered to the Court as Exhibit "A" to said motion a proposed form of consent judgment on Count II of the said complaint, and attorpey for the plaintiff having also tendered to the Court a proposed form of final judgment on Count II of said complaint, and having considered the same,

It is hereby ordered that the plaintiff show cause before this Court on June 14, 1962 at 9:30 A.M. why the said proposed judgment on Count II and attached as Exhibit "A" to the defendants' motion for entry of consent judgment should not be entered by this Court and that the plaintiff, if it desires to file a written formal reply to this order and the defendants' said motion, file and serve on counsel for defendants on or before June 1, 1962 such formal written reply.

DATED at Jacksonville, Florida this May 8, 1962.

BRYAN SIMPSON
United States District Judge

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266 IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

(Title omitted)

Statement of Objections in Response to Show Cause Order—May 31, 1962

1. The Government objects to the failure of the judgment to adjudge that, the defendants have engaged in a

combination and conspiracy in unreasonable restraint of interstate trade and commerce in the sale of bakery products in violation of Section 1 of the Sherman Act.

2. The Government also objects to confining the scope of the injunction to bids for supplying bread and rolls to United States Naval Installations in the Jacksonville area.

3. The Government also objects to limiting the requirement of Section VI, that bids be accompanied by sworn statements of non-collusion, to a three year period.

Dated: May 31, 1962

Respectfully submitted

HENRY M. STUCKEY
Attorney, Department of Justice.

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268 IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

(Title omitted)

Plaintiff's Memorandum in Support of Its Opposition to Motion for Entry of Consent Judgment—May 31, 1962

On May 8, 1962, the defendants in this case filed a motion entitled "Motion for Entry of Consent Judgment." Attached to the motion was a proposed form of judgment which purported to give the precise relief prayed for in the complaint. On May 8, 1962, the Court entered an order directing the Government to show cause why the defendants' motion should not be granted.

The Government strongly opposes the motion for the following reasons.

I

THE COURT IS WITHOUT POWER TO GRANT THE DEFENDANTS' MOTION

To begin with, the defendants are asking the Court to enter a document that has no legal existence. The defendants are asking the Court to enter a "consent" judgment. But there is no such document for the Government has not "consented" to any judgment in this case.

Since the parties have not consented to the entry of any judgment in this case, and since the defendants have denied the allegations of the complaint, and since there has been no admission of a violation of the Sherman Act, no testimony taken or any stipulation of facts, the Court does not have the power to enter any judgment in this case purporting to grant equitable relief. The only purpose of such
269 relief in this case is to enjoin conduct, which if not enjoined, might result in further similar violations. *Local 167* v. *United States*, 291 U.S. 293, 299. In the absence of facts describing an admitted or adjudicated violation, the Court has no record on which it can determine the scope of relief needed to prevent such further violations.

There is no precedent to support the granting of the defendants' proposed motion. There is precedent against it. On April 20, 1960, Judge Wyzanski dismissed a similar suggestion made by the defendants in the case of *United States* v. *Lake Asphalt and Petroleum Company of Massachusetts, et al.*, Civil Action No. 59-786-W, (D. Mass.), as "preposterous," saying:

> It seems to be preposterous for me to purport to act on the consent of one side over the objection of the other side without making findings. It seems to me to be an absolute violation of every rule that I ever heard of.

On June 17, 1960, the Court, in *United States* v. *True Temper Corporation, et al.*, Civil Action No. 58-C-1159, (N.D. Ill.), granted the Government's motion to strike the defendant's answer which denied the substantive allegations but stated that "for purposes of this case only, it will not contest these allegations" and appended to the answer a tendered form of judgment.

In only one case, to the Government's knowledge, has a Court ever, in the absence of any admission of liability, testimony, findings of fact or consent of the parties, entered a judgment over the objection of one of the parties. In that case, *United States* v. *Brunswick-Balka-Collender, et al.*, Civil Action No. 59-C-163, (E.D. Wisc.), the Court, on March 27, 1962, at the request of the defendants, entered a judgment against the defendants and did so over the

objections of the Government. The Government has not yet filed a notice of appeal.

However, if appealed, whether the Supreme Court sustains the lower court or not, that case offers no precedent for the instant case. In that case the judgment that was entered was the result of extensive negotiations
270 between the Government and the defendants which culminated in a judgment that went beyond the relief prayed for in the complaint. In fact, the defendants in that case agreed to all injunctive relief requested by the Government. The defendants objected only to a provision that would require them to admit liability and concede guilt in any treble damage action brought by any state agency based on the same alleged conspiracy. The Court sustained that objection.

In entering the judgment, without that provision, the Court granted injunctive relief of the precise breadths sought by the Government.

It is therefore obvious that the *Brunswick* case is not a precedent for the defendants' motion. They are now seeking to compel the Government to accept narrower injunctive relief than the Government believes the facts warrant. The Government has no objection to a resolution of this issue by the Court upon a proper factual record. The Government insists only that it cannot be resolved by a comparison of the complaint and the proffered injunction, as the defendants' would have the Court resolve it.

II

The Granting of the Defendants' Motion Would Not Be In the Public Interest

In addition to the fact that what the defendants are requesting violates every known rule of law or equity governing the entry of judgments, there are strong reasons of public policy why the judgment proposed by the defendants should not be entered in this case. In the Government's opinion the judgment proposed by the defendants shows on its face that it will not prevent future violations similar to the one charged in the complaint.

First, the judgment fails to give what the Government would be sure of getting if it went to trial and won,
271 that is, in addition, an adjudication of guilt. The value of such an adjudication is indicated by the

lengths to which the defendants have gone to avoid it. In this case and in a companion criminal case the defendants are and were charged with illegally combining and conspiring to fix the price of bread and rolls sold to the Naval installations in the Jacksonville, Florida, area. The Government stands ready to prove the charge. In the criminal case, the defendants have escaped an adjudication usable in this case by pleading *nolo contendere*. Now, still unwilling to change their denials to Count II in the civil case but without offering to prove their innocence, they are asking the Court, in the absence of any facts, to enter a judgment, over the Government's objection, that would prevent any adjudication which the Government or any other party could use against them in this or any other litigation.

Second, in addition to an adjudication of guilt, the trial would result in the public exposure of the defendants' unlawful activities and such exposure is extremely valuable to the Government in connection with its efforts to enforce the antitrust laws and to engender respect for those laws by the community. Indeed, in its over-all enforcement efforts, a public exposure of the defendants' unlawful activities and an adjudication of guilt are often of more value to the Government than the specific injunctive relief that is obtained.

Third, if the case were to be tried the Government would be afforded the opportunity both at the trial and at the hearing on relief to offer evidence in support of its claim for unjunctive relief broader than that offered by defendants' proposed judgment. It should be noted that defendants' proposed judgment ignores paragraph (C) of the Prayer requesting that the Plaintiff have such further, general, and different relief as the nature of the case may require and the Court may deem appropriate in the premises. Even if there were no separate hearing on relief, if the Government's evidence showed a need for broader relief than that offered by the defendants,
272 and we submit that it would, the Government would be entitled to such relief regardless of the specifics of its prayer. Rule 54(c) of the Federal Rules of Civil Procedure provides in part as follows:

> • • • Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, *even if the party has not demanded such relief in his pleadings.* (Emphasis supplied)

While the Government may agree to a consent settlement of a civil case, it cannot properly agree to a consent judgment which provides narrower injunctive relief than the nature of the violation charged warrants. The charge here is bid rigging in selling particular government installations. The defendants having been caught in the act of defrauding the naval installations in the Jacksonville area, it is extremely unlikely that the offense would be reflected in the same place in the same manner. The defendants have offered no proof which would justify the Court in holding that a repetition of the offense in another place with respect to other products sold by them is unlikely. If the injunction is to serve any practical purpose, it must be broad enough to prevent such violations. It is therfore the Government's position that the granting of the defendants' motion in this case would be contrary to sound judicial policy as well as the public interest in antitrust enforcement.

III

The Government's Proposed Judgment Is In the Public Interest

The Government has offered to settle this case by the entry of a judgment which in the Government's opinion will serve the public interest. A copy of this judgment has been filed with the Court. As the Court will notice, the Government's proposed judgment is broader than that of the defendants in the following respects.

Section IV (B) and (C) of the Government's proposed judgment is comparable to Section IV (A) and (B)
273 of the defendants' proposed judgment with the exception that in the Government's proposed judgment the injunction against submitting rigged bids and allocating and rotating business applies to bakery products in general, rather than just "bread and rolls," and is not

confined merely to the Jacksonville area. In addition, Section IV (A) of the Government's proposed judgment contains a general injunction against conspiring to fix the price of bakery products sold to any third party, whereas defendants' proposed judgment relates solely to sales to United States Naval installations in the area.

Section V (B) of the Government's proposed judgment is comparable to Section V of the defendants' proposed judgment but, again, with the exception that in the Government's proposed judgment the injunction applies to bakery products in general, not just "bread and rolls," and is not confined merely to the Jacksonville area nor to sales to such Naval installations. In addition, Section V (A) of the Government's proposed judgment contains a general injunction against "urging or suggesting to any seller of bakery products the quotation or charing of any price or other terms or conditions of sale of bakery products."

Likewise, Section VI of the Government's proposed judgment is comparable to Section VI of the defendants' proposed judgment with the exception that the Government's proposed judgment is broader, requiring the submission of a sworn statement for a five-year period in connection with every bid to supply bakery products to any governmental agency, whereas the defendants' proposed judgment would require such submission for only a three-year period and would be confined to bids to supply "bread and rolls" to Naval installations "in the Jacksonville area," as defined in the defendants' draft.

In sum, the Government's proposed judgment is somewhat broader. But can it be said that the Government is unreasonable in being apprehensive that the defendants, having conspired to fix the price of bread and rolls to certain Government installations in a certain area, will not also attempt to fix the price of other bakery products to other Government installations.

274 The Government is not seeking punitive relief. The defendants have sought to achieve an illegal purpose by traveling one road—is it unreasonable to close other roads by which they might renew their attempt to reach the same illegal end in regard to other products and in other areas!

Whether the case be litigated or not litigated, effective relief requires that the judgment be not confined simply to acts of the precise kind found to have been committed in the past. As the Supreme Court stated in *International Salt Company* v. *United States*, 332 U.S. 392, 400:

> When the purpose to restrain trade appears from a clear violation of the law, it is not necessary that all of the untraveled roads to that end be left open and that only the worn one be closed.

In *Local 167* v. *United States*, 291 U.S. 293, 299, the Supreme Court stated:

> The United States is entitled to effective relief. To that end the decree should enjoin acts of the sort that are shown by the evidence to have been done or threatened in the furtherance of the conspiracy. It should be broad enough to prevent evasion. In framing the provisions doubts should be resolved in favor of the Government and against the conspirators.

And, in the recent decision in *United States* v. *E.I. du Pont de Nemours and Company, et al.*, 366 U.S. 316, 334 (1961), the Court has again emphasized:

> For it is well settled that once the Government has successfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor.

275. CONCLUSION

It is respectfully submitted that the defendants' motion should be denied.

Dated: May 31, 1962

/s/ HENRY M. STUCKEY

/s/ ALFRED KARSTED

Attorneys Department of Justice

276 CERTIFICATE OF SERVICE

(Omitted in printing)

277 IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

(File endorsement omitted)

(Title omitted)

Motion for Leave to Amend Motion for Entry of Consent Decree—Filed June 11, 1962

The Defendants, Ward Baking Company, American Bakeries Company, Derst Baking Company, Flowers Baking Company, Inc. and Southern Bakeries Company, move the court for leave to file an amended motion for entry of consent judgment, a copy of which is attached as Exhibit "A", on the ground that justice requires that the defendants be given an opportunity to correct any defects in their original motion filed herein.

/s/ JOHN W. BALL of
ULMER, MURCHISON, KENT,
ASHBY & BALL
850 Florida National Bank
Building
Jacksonville, Florida
Attorneys for Flowers Baking Company, Inc.

/s/ M. H. BLACKSHEAR, JR. of
KING & SPALDING
434 Trust Company of Georgia
Building
Atlanta 3, Georgia
Attorneys for American Bakeries Company

/s/ FRED H. KENT,
DAVISSON F. DUNLAP of
ULMER, MURCHISON, KENT,
ASHBY & BALL
850 Florida National Bank
Building
Jacksonville, Florida
Attorneys for Ward Baking Company

278 /s/ JOHN H. BOMAN, JR. of
HANSELL, POST, GARDNER,
BRANDON & DORSEY
310 Fulton Federal Building
Atlanta 3, Georgia
Attorneys for Southern Bakeries Company

/s/ JOHN B. MILLER of
HITCH, MILLER, BECKMANN & SIMPSON
400 Georgia State Bank Building
Savannah, Georgia
Attorneys for Derst Baking Company

CERTIFICATE OF SERVICE

(Omitted in printing)

---

279 **Exhibit "A" to Motion**

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

(Title omitted)

Amended Motion for Entry of Judgment

The Defendants, Ward Baking Company, American Bakeries Company, Derst Baking Company, Flowers Baking Company, Inc. and Southern Bakeries Company, before any testimony has been taken in the above captioned cause, move the court to enter against them a judgment as to Count Two of the Plaintiff's complaint, in accordance with the form of the proposed judgment annexed hereto and marked Exhibit "A", and for grounds of said motion, the said Defendants state:

1. The Plaintiff filed a complaint in this cause on July 21, 1961 against the said Defendants.

2. The said complaint contained in Count Two thereof the following allegations concerning alleged violations of the antitrust laws on the part of these Defendants and the effects of the said violations, and a prayer for relief to prevent and restrain the said violations:

"24. The aforesaid combination and conspiracy has consisted of a continuing agreement, understanding, and concert of action among the defendants and other persons to the plaintiff unknown, the substantial terms of which were:

(a) To allocate among themselves the business of supplying bakery products to United States Naval
280 installations in the Jacksonville area; and

(b) To submit noncompetitive, collusive, and rigged bids and price quotations for supplying bakery products to United States Naval installations in the Jacksonville area.

"26. The effects of the aforesaid combination and conspiracy were that:

(a) Competition among the defendants in the sale and distribution of bakery products to United States Naval installations in the Jacksonville area has been suppressed and eliminated, and

(b) United States Naval installations in the Jacksonville area engaged in the purchase of bakery products have been denied the right to receive competitive sealed bids as required by law and have been forced to pay artificially-fixed prices for bakery products.

"28. As a result of the illegal combination and conspiracy alleged herein, plaintiff has been led and induced by defendants to make contract awards on bids solicited by it during the period covered by this complaint, at prices fixed by said illegal combination and conspiracy, and plaintiff has been denied thereby the benefit of competition in prices for bakery products. By the operation of defendants' agreements and concert of action herein alleged, plaintiff has been compelled to pay higher prices than would have been the case but for the violations of the anti-trust laws herein alleged.

"WHEREFORE, plaintiff prays:

(a) That the aforesaid combination and conspiracy, agreements and arrangements be adjudged by the

281 Court to be in unreasonable restraint of the trade and commerce described in this complaint and in violation of Section 1 of the Sherman Act; and that the Court adjudged and decree that the defendants have combined and conspired to restrain interstate trade and commerce in violation of Section 1 of the Sherman Act.

(b) That the defendants be enjoined from (1) allocating among themselves the business of supplying bakery products to United States Naval installations in the Jacksonville area and (2) from submitting non-competitive collusive, and rigged bids and price quotations for supplying bakery products to United States Naval installations in the Jacksonville area.

(c) That the plaintiff have such further, general, and different relief as the nature of the case may require and the Court may deem appropriate in the premises.

(d) That the plaintiff recover its taxable costs."

3. In the said complaint the plaintiff defined the term "Bakery Products" and "Jacksonville Area" as used in the complaint, as follows:

"4. As used in this complaint:

(a) "Bakery Products" means bread and rolls.

(b) "Jacksonville area" means the are within

(1) the northern part of the State of Florida, and

(2) the southeastern part of the State of Georgia."

4. The form of the proposed judgment tendered as Exhibit "A" attached to this motion is framed in much broader language than in the language used by the Plaintiff in its prayer for relief and provides for much greater scope of relief and grants the Plaintiff, the United States Government, with every safeguard needed to accomplish the only proper purpose of Count Two of the Plaintiff's complaint, namely, the prevention and restraint of
282 violations of the antitrust laws as set forth in Count Two of said complaint. The form of proposed judgment tendered as Exhibit "A" grants to the plaintiff all of the relief which could be reasonably expected in this

case after litigation and if the court granted injunctive relief of a greater scope than that set forth in the proposed judgment, such relief would not have a constitutional or statutory basis in this action.

5. The Plaintiff shows by the attached affidavit of one of the counsel for Defendant, namely M. H. Blackshear, Jr., annexed hereto as Exhibit "B", that it is attempting through its bargaining position to coerce the defendants to agree to relief which could not be reasonably expected after litigation and which ignores the prosecutor's responsibility to stay within statutory and constitutional bounds. The Plaintiff thrusts the Defendants in the position to either agree to the unwarranted provisions required by the Plaintiff or else to go through a costly and protracted trial with its attendant expense.

6. That the Plaintiff and Defendants have settled Count One of the complaint by agreement between them, and therefore all issues between the moving Defendants and the Plaintiff stand resolved and there remains no just reason for delaying the entry of the final judgment against these Defendants in accordance with the proposed form of judgment annexed to this motion as Exhibit "A".

7. By entry of the proposed judgment, both the Plaintiff and Defendants will be spared the ordeal of a costly and protracted trial and the entry of such judgment will be in accordance with the Congressional policy to encourage judgments and decrees in antitrust cases wherein the government is plaintiff and private parties are defendants. See *Twin Ports Oil Co.* v. *Pure Oil Co., et al.* (D.C.D. Minn. 1939) 26 F. Supp. 366.

8. Defendants ask the Court to enter a judgment in the present case as if all of the allegations in the complaint were proven as true.

/s/ JOHN W. BALL of
ULMER, MURCHISON, KENT,
ASHBY & BALL
850 Florida National Bank
Building
Jacksonville, Florida
Attorneys for Flowers Baking Company, Inc.

283

/s/ M. H. Blackshear, Jr. of
King & Spalding
434 Trust Company of Georgia
Building
Atlanta 3, Georgia
Attorneys for American
Bakeries Company

/s/ Fred H. Kent
Davisson F. Dunlap of
Ulmer, Murchison, Kent,
Ashby & Ball
850 Florida National Bank
Building
Jacksonville, Florida
Attorneys for Ward Baking
Company

/s/ John H. Boman, Jr. of
Hansell, Post, Gardner,
Brandon & Dorsey
310 Fulton Federal Building
Atlanta 3, Georgia
Attorneys for Southern
Bakeries Company

/s/ John B. Miller of
Hitch, Miller, Beckmann
& Simpson
400 Georgia State Bank Building
Savannah, Georgia
Attorneys for Derst Baking
Company

Certificate of Service

(Omitted in printing)

(File endorsement omitted)

289 IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

(Title omitted)

Affidavit of M. H. Blackshear, Jr.—Filed June 11, 1962

IN PERSON APPEARED before the undersigned authority, M. H. BLACKSHEAR, JR., who after being first duly sworn on oath, deposes and says:

I am a partner in the firm of King & Spalding, formerly Spalding, Sibley, Troutman, Meadow & Smith, and that as such I am of counsel for defendant American Bakeries Company in the within case. I also was of counsel for American Bakeries Company in the Criminal Case, Indictment No. 11,677J, returned true by the grand jury on March 6, 1961, in the United States District Court for the Southern District of Florida, Jacksonville Division, against Ward Baking Company, American Bakeries Company, Derst Baking Company, Flowers Baking Company, Inc., and Southern Bakeries Company.

290 I conferred with attorneys for the other defendants in the within case and it was agreed by all counsel for these defendants that an effort should be made to settle both Counts I and II of this case and I was authorized to speak for the entire group in such negotiations. I discussed the terms of settlement for Count I by telephone and in person with Henry M. Stuckey, Trial Attorney of the Department of Justice handling this case, and as a result of these negotiations, offered on behalf of all defendants to make settlement of Count I by paying $44,000. Henry M. Stuckey expressed his personal approval of this offer and stated that he would recommend its acceptance and suggested that I come to Washington for the purpose of concluding a settlement based upon this offer.

Until I arrived in Washington on March 29, 1962, for conference arranged by Mr. Stuckey, settlement of Count II had not been discussed. Upon arrival in Washington on March 29th, Mr. Stuckey advised me that in order to get favorable action on our offer for settlement of Count I, it would be necessary for the defendants to consent to an

injunction on Count II. I stated that while I had hoped that the Government would dismiss Count II on settlement of Count I, I had been authorized by my client and by counsel for all the other defendants to agree to an injunction in accordance with the specific prayers for relief upon Count II. Without seeking to obtain by negotiations any milder decree, I said that all defendants would agree to be so enjoined.

Mr. Stuckey informed me that he had arranged a conference with William D. Kilgore, Jr., Esq., Chief of the Judgments and Judgment Enforcement Section and that an agreement on the injunction must be reached with Mr. Kilgore. When we met with Mr. Kilgore, he had prepared and submitted to me a proposed stipulation and
291 final judgment, copies of which are attached, identified as Exhibits "A" and "B", respectively, and by reference incorporated in this affidavit. I had not previously had any intimation that the Government expected or wished a judgment broader than that prayed on Count I. I consequently informed Messrs. Kilgore and Stuckey that I had no authority from any of the defendants to consent to a broad injunction such as was proposed and if the Government would not accept in settlement a decree granting an injunction as prayed, the conference might as well be broken off as this was the full limit of my authority. Mr. Kilgore was unwilling to recommend such a narrow judgment and, consequently, the conference was terminated.

Acting at the suggestion of Henry M. Stuckey on my return to Atlanta, I drafted a proposed final judgment, copy of which is hereto attached, marked Exhibit "C" and this judgment was submitted to Henry M. Stuckey on April 12th accompanied by letter, copy of which is hereto attached, marked Exhibit "D".

By letter dated April 17, 1962, my proposed final judgment was acknowledged by William D. Kilgore, Jr. of the Department of Justice who countered by offering to recommend settlement on the basis of proposed final judgment, copy of which is marked Exhibit "E", attached hereto and incorporated herein.

I acknowledged this letter and draft by letter to William D. Kilgore, Jr., dated April 23, 1962, copy of which is marked Exhibit "F", attached hereto and incorporated herein.

Subsequently, deponent was informed that the Department of Justice was willing to settle Count I for $44,000 without a settlement of Count II and settlement of Count I has now been completed upon that basis.

292 At the same time, deponent was informed through Henry M. Stuckey that the Department of Justice was willing to modify its last draft of proposed final judgment in such manner as to make it clear that these manufacturers of bakery products would not be prohibited from printing the retail price for each item upon the package and also to provide that the certification of no collusion on Government bids be limited to a period of three (3) years following the entry of judgment.

Acting for all defendants in Criminal Case No. 11,677J, I undertook my negotiations with Henry M. Stuckey on November 18, 1960, to determine what civil demands the Government intended to make upon these defendants. Deponent was then informed that no civil action was contemplated. Acting in part upon this representation, the defendants decided to tender a plea of nolo contendere and did tender such plea which was accepted by this Court. The Government objected to the acceptance of these pleas and through counsel made a very full statement with respect to the Government's position. Such statement did not, however, indicate that civil action of any type was contemplated by the Government and deponent was entirely unaware that any such action was, in fact, planned until this suit was filed on July 21, 1961.

/s/ M. H. Blackshear, Jr.
M. H. Blackshear, Jr.

Sworn to and subscribed before
me this 6th day of June, 1962.

Joyce C. Jackson
Notary Public

Notary Public, Georgia State at Large
My Commission Expires Oct. 9, 1964

293 **Exhibit "A" to Affidavit**

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

Civil No. 4735-Civ.-J

UNITED STATES OF AMERICA, *Plaintiff*,

v.

WARD BAKING COMPANY, AMERICAN BAKERIES COMPANY, DERST BAKING COMPANY, FLOWERS BAKING COMPANY, INC. and SOUTHERN BAKERIES COMPANY, *Defendants*.

STIPULATION

It is stipulated by and between the undersigned parties, by their respective attorneys, that:

(1) The said parties consent that a Final Judgment in the form hereto attached and filed herewith may be filed and entered by the Court at any time after the expiration of thirty (30) days following the date of filing of this Stipulation without further notice to any party or other proceedings, either upon the motion of any party or upon the Court's own motion, provided that plaintiff has not withdrawn its consent as provided herein;

(2) The plaintiff may withdraw its consent hereto at any time within said period of thirty (30) days by serving notice thereof upon the other parties hereto and filing said notice with the Court;

(3) In the event plaintiff withdraws its consent hereto, this Stipulation shall be of no effect whatever in this or any other proceeding and the making of this Stipu-
294 lation shall not in any manner prejudice any consenting party in any subsequent proceedings.

Dated: , 1962

For the Plaintiff:

LEE LOEVINGER
Assistant Attorney General

W. D. KILGORE, JR.
MARGARET H. BRASS
HENRY M. STUCKEY
WILLIAM P. CASSEDY
Attorneys, Department of Justice

For the defendants:

AMERICAN BAKERIES COMPANY

By M. H. BLACKSHEAR, JR.
KING & SPALDING

DERST BAKING COMPANY

JOHN B. MILLER
HITCH, MILLER, BECHMAN & SIMPSON

SOUTHERN DARIES COMPANY

By: JOHN H. BOMAN, JR.

HANSELL, POST, GARDNER,
BRANDON & DORSEY

WARD BAKING COMPANY and FLOWERS
BAKING COMPANY, INC.

By: FRED KENT

By: JOHN W. BALL

By: DAVISSON F. DUNLAP

All members of the firm of ULMER,
MURCHISON, KENT, ASHBY & BALL

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295 APPENDIX

AFFIDAVIT

The undersigned hereby certify to their best knowledge and belief that:

(1) The bid to .....
(name of recipient of bid) dated .....
has not been prepared by .....
(name of defendant) in collusion with any other seller of bakery products, and

(2) The prices, terms or conditions of said bid have not been communicated by the undersigned nor by any employee or agent of .....
(name of defendant), to any other seller of bakery products and will not be communicated to any such seller prior to the official opening of said bid,

in violation of the Final Judgment in Civil No. 4735-Civ.-J entered by the United States District Court for the Southern District of Florida, Jacksonville Division, on 1962.

Dated: ....., 1962

Signature of person responsible for the preparation of the bid

Signature of person supervising the above person, where feasible

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296 **Exhibit "B" to Affidavit**

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

Civil No. 4735-Civ.-J

UNITED STATES OF AMERICA, *Plaintiff*,

v.

WARD BAKING COMPANY, AMERICAN BAKERIES COMPANY, DERST BAKING COMPANY, FLOWERS BAKING COMPANY, INC. and SOUTHERN BAKERIES COMPANY, *Defendants*.

FINAL JUDGMENT

Plaintiff, United States of America, having filed its complaint herein on July 21, 1961, and the plaintiff and the defendants by their respective attorneys having severally consented to the entry of this Final Judgment, without trial or adjudication of any issue of fact or law herein;

Now, THEREFORE, before the taking of any testimony and the defendant Derst Baking Company having heretofore been dismissed as a defendant under Count I of the complaint herein, and plaintiff and the remaining defendants having jointly moved to dismiss Count I, it is hereby

ORDERED, ADJUDGED AND DECREED as follows:

I

Count I of the complaint is hereby dismissed. This Court has jurisdiction of the subject matter hereof and of the parties consenting hereto, and Count II of the complaint

states a claim upon which relief may be granted against the defendants under Section 1 of the Act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as aemnded.

297

II

The provisions of this Final Judgment applicable to any defendant shall apply also to each of its subsidiaries, successors, assigns, officers, directors, agents and employees, and to all other persons in active concert or participation with such defendant who shall have received actual notice of this Final Judgment by personal service or otherwise.

III

Each of the defendants is enjoined and restrained from directly or indirectly entering into, adhering to, or claiming or maintaining any right under any contract, agreement, arrangement, understanding, plan or program with any other person to:

(A) Eliminate or suppress competition in the manufacture or sale of any products;

(B) Establish, maintain, stabilize or fix prices or other terms or condition for sale of any products to any third person;

(C) Submit noncompetitive, collusive or rigged bids, or quotations; or

(D) Allocate, divide or rotate customers.

IV

Each defendant is enjoined and restrained from directly or indirectly:

(A) Urging or suggesting to any seller of bakery products the quotation or charging of any price or other terms or condition of sale;

(B) Disclosing to or exchanging with any seller of bakery products the intention to submit or not submit a bid or quotation, the fact that a bid or quotation has or has not been submitted or made, or the content or terms of any bid or quotation.

V

Each defendant is ordered and directed to submit a sworn statement in the form set forth in the Appendix hereto with each bid for bakery products submitted
298 to any governmental agency (unless such agency requires the submission of a different type of sworn statement to the same effect), such sworn statement to be signed by a principal officer of said defendant and by the person actually responsible for the preparation of said bid.

VI

For the purpose of securing compliance with this Final Judgment duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to any defendant made to its principal office, be permitted, subject to any legally recognized privilege and with the right of said defendant to have counsel present:

(A) Reasonable access during the office hours of said defendant, to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of said defendant, relating to any of the matters contained in this Final Judgment; and

(B) Subject to the reasonable convenience of said defendant, and without restraint or interference, to interview officers and employees of said defendant, who may have counsel present, regarding such matters.

Upon such written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, the said defendant shall submit such written reports with respect to any of the matters contained in this Final Judgment as from time to time may be necessary for the purpose of enforcement of this Final Judgment.

No information obtained by the means permitted in this Section shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the plaintiff except in the course of legal proceedings
299 for the purpose of securing compliance with this Final Judgment in which the United States is a party or as otherwise required by law.

VII

Jurisdiction is retained for the purpose of enabling any of the parties consenting to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropirate for the construction or carrying out of this Final Judgment, for the modification or termination of any of the provisions thereof, for the enforcement of compliance therewith, and punishment of violations thereof.

Dated: ....., 1962

.....

United States District Judge

---

300 **Exhibit "C" to Affidavit**

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

Civil No. 4735-Civ.-J

UNITED STATES OF AMERICA, *Plaintiff*,

v.

WARD BAKING COMPANY, AMERICAN BAKERIES COMPANY, DERST BAKING COMPANY, FLOWERS BAKING COMPANY, INC. and SOUTHERN BAKERIES COMPANY, *Defendants*.

FINAL JUDGMENT

Plaintiff, United States of America, having filed its complaint herein in two Counts on July 21, 1961, and the defendants, Ward Baking Company, American Bakeries Company, Derst Baking Company, Flowers Baking Company, Inc. and Southern Bakeries Company, having appeared and filed their answers to such complaint denying the substantive allegations of both Counts thereof, and the plantiff and the defendants by their respective attorneys having severally consented to the entry of this final judgment, without trial or adjudication of any of the issues of fact or law herein and before the taking of any testimony;

NOW, THEREFORE, Derst Baking Company having been dismissed from Count I, the plaintiff and the remaining

defendants in Count I after the dismissal of Derst Baking Company, having jointly moved the Court to dismiss Count I, it is hereby

ORDERED, ADJUDGED AND DECREED;

That Count I of the complaint be and it is hereby dismissed as to Ward Baking Company, American Bakeries Company, Flowers Baking Company, Inc. and Southern Bakeries Company, with prejudice.

301 The plaintiff and the defendants by their respective attorneys having severally consented to the entry of this final judgment on Count II without trial or adjudication of any of the issues of fact or law therein and before the taking of any testimony, it is hereby

ORDERED, ADJUDGED AND DECREED upon Count II of the complaint as follows:

I.

This Court has jurisdiction of the subject matter of Count II hereof and of the parties named in said Count and said Count II of the complaint states a claim upon which relief may be granted against the defendants under § 1 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies" commonly known as the Sherman Act, as amended.

II.

As used in this final judgment, "bakery products" means bread and rolls.

III.

The provisions of this final judgment applicable to any defendant shall apply also to each of its subsidiaries, successors, assigns, officers, directors, agents and employees, and to all other persons in active concert or participation with such defendant who shall have received actual notice of this final judgment by personal service or otherwise.

IV.

Each of the defendants is enjoined and restrained from directly or indirectly entering into, adhering to, or claim-

ing or maintaining any right under any contract, agreement, arrangement, understanding, plan or program with any other person to:

(a) Submit noncompetitive, collusive or rigged bids, or quotations for supplying bakery products to United States of America, its agencies and instrumentalities, or

(b) Allocate, divide or rotate the business of supplying bakery products to United States of America, its agencies or instrumentalities.

V.

Each defendant is enjoined and restrained from directly or indirectly disclosing to or exchanging with any seller of bakery products the intention to submit or not submit a bid or quotation for supplying bakery products to United States of America, its agencies or instrumentalities, the fact that such a bid or quotation has or has not been submitted or made, or the content or terms of any such bid or quotation.

VI.

Each defendant is ordered and directed, for a period of three years after the date of entry of this final judgment, to submit a sworn statement in the form set forth in the Appendix hereto with each bid for bakery products submitted to the United States of America or any of its agencies or instrumentalities (unless such agency or instrumentality requires the submission of a different type of certificate or sworn statement to the same effect), such sworn statement to be signed by the person actually responsible for the preparation of said bid.

VII.

For the purpose of securing compliance with this final judgment duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to any defendant made to its principal office, be permitted, subject to any legally recognized privilege and with the right of said defendant to have counsel present:

303 (a) Reasonable access during the office hours of said defendant, to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of said defendant, relating to the supplying of bakery products to any of the matters contained in this final judgment; and

(b) Subject to the reasonable convenience of said defendant, and without restraint or interference, to interview officers and employees of said defendant, who may have counsel present, regarding such matters contained in this final judgment.

Upon such written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, the said defendant shall submit such written reports with respect to supplying bakery products to any Naval installation in the Jacksonville area.

No information obtained by the means permitted in this Section shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the plaintiff except in the course of legal proceedings for the purpose of securing compliance with this final judgment in which the United States is a party or as otherwise required by law.

VIII.

Jurisdiction is retained for the purpose of enabling any of the parties consenting to this final judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this final judgment, for the modification or termination of any of the provisions thereof, for the enforcement of compliance therewith, and punishment of violations thereof.

Dated: ....., 1962.

.....

United States District Judge

304 **Exhibit "D" to Affidavit**

April 12, 1962

Mr. Henry M. Stuckey
Antitrust Division
Department of Justice
Washington 25, D. C.

Re: U.S.A. v. Ward Baking Company, et al
No. 4735-Civ-J, USDC SD Florida

Dear Henry:

In addition to the original of this letter addressed as set out, I am sending a copy with copy of enclosures, marked "Personal", and addressed to the SEC South Building with the hope that one or the other of these letters will be in your hands by Friday, April 13th.

I enclose draft of proposed final judgment embodying terms on which I feel sure the defendants will be willing to make a settlement of this case. All of the attorneys are in accord but clearance with two of the defendants has not been completed as this is being written. I expect the okay from these two defendants either today or tomorrow and feel so sure that it will be forthcoming that I am sending forward our proposed judgment and will call you as soon as the remaining clearances have been received.

This offer to settle is submitted with the understanding that its acceptance by the Government will constitute a complete and final settlement of all the Government's claims growing out of the transaction described in this suit. The offer is also made upon the assumption that no other criminal prosecutions are presently contemplated by the Government against any corporation or individual on account of either the incidents involved in this suit or the incidents which formed the basis of indictment number 11,676-J which we have referred to as the alleged
305 general price conspiracy indictment. The offer is also made with the understanding that the Government is not presently contemplating any further civil action based on the alleged general price conspiracy, indictment number 11,676-J. If I am wrong on either of these assumptions, please let me know and disregard the offer of settlement. If my assumptions are correct and if we can agree

upon a settlement, then we would like an understanding with you that when the proposed consent decree is submitted to Judge Simpson, you will then state that the Government plans no further action, civil or criminal. The five defendants, Ward Baking Company, American Bakeries Company, Derst Baking Company, Flowers Baking Company, Inc. and Southern Bakeries Company offer $44,000 in full settlement with prejudice of the monetary claims of the Government contained in Count I. As you will see from the proposed draft judgment, this settlement of Count I will result in a dismissal of the Count as to all defendants but Derst, with prejudice. A letter will be written to the attorney for Derst by the Assistant Attorney General for the Antitrust Department agreeing not to reinstitute against Derst the charges contained in Count I. Derst, of course, is to be dismissed from Count I for want of venue if it has not already been so dismissed.

Settlement of Count II will be by consent injunction according to the terms of the enclosed draft final judgment. I believe this draft is self-explanatory.

If necessary, I will come to Washington but I hope that the trip will not be necessary and that the Government can see its way clear to accept the proposals that we have here outlined.

With personal regards, I am

Very truly yours,

M. H. Blackshear, Jr.

MHBJr:sl
Enclosure

306 Exhibit "E" to Affidavit

UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D. C.

WDK
60-70-52

April 17, 1962

M. H. Blackshear, Jr., Esquire
King and Spalding
434 Trust Company of Georgia Bldg.
Atlanta 3, Georgia

Re: United States v. Ward Baking Company, et al.,
No. 4735-Civ.-J, S.D. Florida

Dear Mr. Blackshear:

Reference is made to your letter of April 12, 1962 to Mr. Stuckey forwarding a proposed judgment in the above-captioned case.

I have carefully reviewed your draft judgment and I am happy that you have been able, at least to a limited extent, to meet the position which I had taken as embodied in the draft judgment given to you at our recent meeting.

In order to assure that we have explored all avenues looking toward a possible consent judgment in this action, I have taken the liberty of revising my draft judgment also in an endeavor to meet your position or come as close thereto as possible. I am thus forwarding to you four copies of a revised draft judgment which I am willing to recommend to the Assistant Attorney General.

You will note that in my draft judgment I have not included a definition of "bakery products" as I do not consider it appropriate that the judgment should be limited to bread and rolls. See, e.g., *United States* v. *U. S. Gypsum*, 340 U.S., 76. You will note that in Sections IV and V I have limited the coverage of the prohibitions in an attempt to meet your position.

307 With respect to the various assurances set forth in your letter, I regret that I am unable at this stage to tell you the Division's position in this regard; however, I am willing to recommend to the Assistant Attorney General that the draft letter heretofore given to you to go to

counsel for Derst Baking Company be expanded to include an official statement that the Department does not presently intend filing any criminal or civil proceedings with respect to the various transactions out of which the Department's recent cases evolved.

If you would care to discuss any of these matters, please do not hesitate to call upon me.

Sincerely yours,

WM. D. KILGORE, JR.
William D. Kilgore, Jr.
Chief, Judgments and Judgment Enforcement Section
Antitrust Division

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308 **Exhibit "F" to Affidavit**

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

Civil No. 4735-Civ.-J

UNITED STATES OF AMERICA, *Plaintiff*,

v.

WARD BAKING COMPANY, AMERICAN BAKERIES COMPANY, DERST BAKING COMPANY, FLOWERS BAKING COMPANY, INC. and SOUTHERN BAKERIES COMPANY, *Defendants*.

FINAL JUDGMENT

Plaintiff, United States of America, having filed its complaint herein on July 21, 1961, and the plaintiff and the defendants by their respective attorneys having severally consented to the entry of this Final Judgment, without trial or adjudication of any issue of fact or law herein;

Now, THEREFORE, before the taking of any testimony and the defendant Derst Baking Company having heretofore been dismissed as a defendant under Count I of the complaint herein, and plaintiff and the remaining defendants having jointly moved to dismiss Count I, it is hereby

ORDERED, ADJUDGED AND DECREED as follows:

I

Count I of the complaint is hereby dismissed with prejudice.

II

This Court has jurisdiction of the subject matter hereof and of the parties consenting hereto, and the complaint states a claim under Count II upon which relief may be granted against the defendants under Section 1 of
309 the Act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended.

III

The provisions of this Final Judgment applicable to any defendant shall apply also to each of its subsidiaries, successors, assigns, officers, directors, agents and employees, and to all other persons in active concert or participation with such defendant who shall have received actual notice of this Final Judgment by personal service or otherwise.

IV

Each of the defendants is enjoined and restrained from directly or indirectly entering into, adhering to, or claiming or maintaining any right under any contract, agreement, arrangement, understanding, plan or program with any other person to:

(A) Establish, maintain, stabilize or fix prices or other terms or condition for sale of any bakery products to any third person;

(B) Submit noncompetitive, collusive or rigged bids, or quotations for the sale of bakery products;

(C) Allocate, divide or rotate customers for the sale of bakery products.

V

Each defendant is enjoined and restrained from directly or indirectly:

(A) Urging or suggesting to any seller of bakery products the quotation or charging of any price or other terms or condition of sale of bakery products;

(B) Disclosing to or exchanging with any seller of bakery products the intention to submit or not submit a bid or quotation, the fact that a bid or quotation has or has not been submitted or made, or the content or terms of any bid or quotation.

310

VI

Each defendant is ordered and directed for five (5) years from the date of entry of this Final Judgment to submit a sworn statement in the form set forth in the Appendix hereto with each bid for bakery products submitted to any governmental agency (unless such agency requires the submission of a different type of sworn statement to the same effect), such sworn statement to be signed by a principal officer of said defendant and by the person actually responsible for the preparation of said bid.

VII

For the purpose of securing compliance with this Final Judgment duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to any defendant made to its principal office, be permitted, subject to any legally recognized privilege and with the right of said defendant to have counsel present:

(A) Reasonable access during the office hours of said defendant, to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of said defendant, relating to any of the matters contained in this Final Judgment; and

(B) Subject to the reasonable convenience of said defendant, and without restraint or interference, to interview officers and employees of said defendant, who may have counsel present, regarding such matters.

Upon such written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, the said defendant shall submit such written

reports with respect to any of the matters contained in this Final Judgment as from time to time may be
311 necessary for the purpose of enforcement of this Final Judgment.

No information obtained by the means permitted in this Section shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the plaintiff except in the course of legal proceedings for the purpose of securing compliance with this Final Judgment in which the United States is a party or as otherwise required by law.

VIII

Jurisdiction is retained for the purpose of enabling any of the parties consenting to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction of carrying out of this Final Judgment, for the modification or termination of any of the provisions thereof, for the enforcement of compliance therewith, and punishment of violations thereof.

Dated: ....., 1962

.....
United States District Judge

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312 APPENDIX

AFFIDAVIT.

The undersigned hereby certify to their best knowledge and belief that:

(1) The bid to .....
(name of recipient of bid) dated .....
has not been prepared by .....
(name of defendant) in collusion with any other seller of bakery products, and

(2) The prices, terms or conditions of said bid have not been communicated by the undersigned nor by any employee or agent of .....

(name of defendant), to any other seller of bakery products and will not be communicated to any such seller prior to the official opening of said bid,

in violation of the Final Judgment in Civil No. 4735-Civ.-J entered by the United States District Court for the Southern District of Florida, Jacksonville Division, on ....., 1962.

Dated: .....

.....
Signature of person responsible for the preparation of the bid

.....
Signature of person supervising the above person, where feasible

(File endorsement omitted)

313 IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

(Title omitted)

Affidavit Filed Before Me June 14, 1962—Bryan Simpson, U. S. District Judge

CITY OF WASHINGTON }
DISTRICT OF COLUMBIA } ss:

HENRY M. STUCKEY, being first duly sworn, deposes and says: I am employed as a trial attorney in the Antitrust Division of the Department of Justice at Washington, D. C., and have been assigned to duties connected with the preparation of the above-captioned civil antitrust case and criminal cases numbered 11,676-J and 11,677-J filed in this Court on March 6, 1961. In the course of performing these duties I have had occasion to confer with counsel for the defendants by telephone and in person, including M. H. Blackshear, Jr.

With respect to the last paragraph of affidavit of M. H. Blackshear, Jr., sworn and subscribed to on June 6, 1962

and to be filed in this Court on June 14, 1962, which states in part:

> Acting for all defendants in Criminal Case No. 11,677-J, I undertook by negotiations with Henry M. Stuckey on November 18, 1960, to determine what civil demands the Government intended to make upon these defendants. Deponent was then informed that no civil action was contemplated.

314 deponent says:

1. That no negotiations to "determine what civil demands the Government intended to make upon these defendants" took place on November 18, 1960 or at any other time up to July 21, 1961 between deponent and M. H. Blackshear, Jr.

2. That M. H. Blackshear, Jr. was never informed by deponent "that no civil action was contemplated" in this matter on November 18, 1960 or at any other time up to July 21, 1961.

Deponent further says that Criminal Cases Numbered 11,676-J and 11,677-J were filed on March 6, 1961 and Civil Case No. 4735-Civ-J was filed on July 21, 1961. Therefore, on November 18, 1960 there was no case, criminal or civil, pending against these defendants which could possibly have been the subject of any conversation or negotiations between deponent and M. H. Blackshear, Jr. Deponent further says that he was ordered to prepare and file Civil Case No. 4735-Civ-J sometime between April 11 and May 1, 1961 and that prior thereto he had no knowledge whether the Department would or would not file a "civil demand" against the defendants.

/s/ Henry M. Stuckey
Henry M. Stuckey

Subscribed and sworn to before me this 13th day of June 1962

George T. McCarter
Notary Public

District of Columbia
My Commission Expires
Feb. 28, 1967

(File endorsement omitted)

315 IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

No. 4735-Civil-J

UNITED STATES OF AMERICA

v.

WARD BAKING COMPANY, AMERICAN BAKERIES COMPANY, DERST BAKING COMPANY, FLOWERS BAKING COMPANY, INC., and SOUTHERN BAKERIES COMPANY, *Defendants.*

Excerpts From Transcript of Proceedings on Order to Show Cause

Before the Honorable Bryan Simpson, Judge of the above Court, in Chambers, at Jacksonville, Florida, on Thursday, June 14, 1962, commencing at 9:45 A.M.

JOSEPH A. SHERIDAN,
Official Reporter.

316 **Appearances**

For the Government:

HENRY M. STUCKEY, Esquire
Department of Justice,
Washington, D. C.

For the Defendants:

MESSRS. ULMER, MURCHISON, KENT, ASHBY & BALL
By: JOHN W. BALL, Esquire, and
DAVISSON F. DUNLAP, Esquire.
Representing Ward Baking Company, and Flowers Baking Company, Inc.

MESSRS. KENT and SPALDING
434 Trust Company of Georgia Building,
Atlanta, Georgia.

By: M. H. BLACKSHEAR, JR., Esquire.
Representing American Bakeries Company.

MESSRS. HITCH, MILLER & BECKMANN
P.O. Box 2126,
Savannah, Georgia.

By: JOHN B. MILLER, Esquire.
Representing Derst Baking Company.

MESSRS. CRENSHAW, HANSELL, WARE, BRANDON & DORSEY
310 Fulton Federal Building,
Atlanta 3, Georgia.

By: JOHN B. BOMAN, JR., Esquire.
Representing Southern Bakeries Company.

321 **Argument by Mr. Stuckey**

Mr. Stuckey:

As Your Honor recalls, the Government presented to the Court on May 8th its proposed Consent Decree and at the same time the defendants proposed their Consent Decree.

The Government objects to the filing or entry of the defendants' Decree on three principal grounds. I might say that these objections also go to the Decree that I was served with this week, the new Amended Decree which has been filed with the Court.

322 The Court: I don't believe I have that.

Mr. Dunlap: Yes, sir. I believe it's either under there with the affidavit there; they put the affidavit on top. There is a Motion for Leave to File the Amended because, under the Rules, I couldn't file it. It was in the form of a Motion to the Court for Leave to File Amended Motion.

Mr. Stuckey: I think it's Exhibit—

The Court: It may be an exhibit to the affidavit.

Mr. Dunlap: No, sir. The affidavit was an exhibit to it.

Mr. Stuckey: It's Exhibit C, Your Honor.

Mr. Dunlap: If I might straighten out the pleadings, Your Honor: There was a Motion to move the Court for leave to file amended Motion for entry of Consent Judgment.

The Court: Well, I'm just going by what the Clerk has filed here. There was your Motion for Entry of

323 Consent Judgment on the 8th of May.

Mr. Dunlap: Yes, sir.

The Court: And the Stipulation—

Mr. Dunlap: Yes, sir.

The Court: —which was— I don't understand what the Stipulation has to do about reply briefs. Is this in the right case?

Mr. Dunlap: Yes, sir. That was the brief. If you will recall, Your Honor, we had a time limitation on the brief of the respondents in relationship to the last legal point which was left unresolved by the settlement of Count I, and that was, namely, the Motion to Dismiss because— on the pleadings—on the ground that it did not properly state grounds pleadingwise on which to grant the injunctive relief. And you'll recall, Your Honor, we decided to extend the time for us to file those briefs since we were having this Rule to Show Cause hearing coming up. That was an Order to further postpone the time for our filing briefs.

324 The Court: I thought Count I was cleaned—

Mr. Dunlap: This is on Count II, Your Honor. After Count I, the only thing left—if you will recall, Your Honor, we had a full argument on Counts I and II and then, when we settled Count I, most of that argument went out the window.

The Court: Yes.

Mr. Dunlap: Because most of it related to Count I. However there was one point left as to Count II relating to the Motion to Dismiss Count II on the ground that there had not been sufficient grounds alleged in the Complaint in order to go forward on the injunctive relief, and that was the only legal point that was left in the case. Your Honor had given us time to file briefs on the whole matter at the end of that argument. Then we came and settled Count I and that left only this one point to be briefed, and, Your Honor, at that time, at the last hearing, we then agreed to extend the time for the filing of that brief on the Motion to Dismiss.

The Court: Isn't that largely mooted by what we did on May 8?

325 Mr. Stuckey: Most of it is as a practical matter, I would say; yes, sir.

Mr. Dunlap: We did extend the time at that time.

The Court: You did. That Stipulation was entered into; that's what I ran across there but I don't—

Mr. Dunlap: I believe the Court suggested it at that time, or we—but we brought up the matter and it was agreed that we would extend it. That's my recollection.

Mr. Stuckey: I called the Judge on the telephone and told him we were negotiating on Count II.

Mr. Dunlap: Yes.

The Court: This was entered May 8, at the time you were before me. Isn't May 8 the date you were before me?

Mr. Dunlap: Yes, sir. This was the date of the argument and that was in our total conference.

326 The Court: I guess that was simply to preserve it—

Mr. Dunlap: Yes, sir.

The Court: —if all negotiations fell down.

Mr. Dunlap: That's correct.

Mr. Stuckey: I think our briefs were due May the 11th and we had this other argument on May 8th.

Mr. Dunlap: I believe that's correct.

The Court: Simply to preserve it.

Going ahead with what I started to say, there is a paper of May 8th. I quashed the service as to Derst.

Mr. Stuckey: That's correct.

The Court: And Derst was dismissed from Count I.

Mr. Dunlap: Yes, sir.

The Court: Then I entered the Order to Show Cause, and then the plaintiff files his objections and memo-

327 randum, statement of its objections to the Show Cause Order and supporting memorandum. And then there is Mt. Blackshear's affidavit, with attached exhibits, and that's all. There isn't any Motion for Leave to File any Amended Decree.

Mr. Dunlap: Your Honor, I sent such a Motion over and I served such a Motion on Mr. Stuckey and on the U.S. Attorney. I don't know whether it was not filed or loose but it was sent over at the same time. It was sent over at the same time.

Mr. Boman: Do you have a copy of it there?

Mr. Dunlap: I have a copy of it here, Your Honor.

Mr. Stuckey: Here is my copy, if you would like to see it.

The Court: I want to be sure it is filed.

Mr. Stuckey: My letter says it was—

Mr. Dunlap: May I approach?

The Court: Sure.

328 Mr. Dunlap: This was filed all at the same time. (Indicating)

The Court: The same as this?

Mr. Dunlap: Yes, sir.

The Court: Same as June 11?

Mr. Dunlap: Yes, sir. See, we had the Motion, because under the Rules I can't file an Amended Motion without the Court's permission, so we amended our Motion for entry of judgment. We offered the proposed judgment and we put, as an exhibit, this affidavit on it and I served all of those.

The Court: All we got was the affidavit, the affidavit and the attachments.

Mr. Dunlap: Yes, sir. And I served it on Mr. Stuckey by mail and also the U.S. Attorney.

The Court: At any rate, whether we can find it in the Clerk's office or not, he is on record as—he is on notice, rather, as to what—

329 Mr. Dunlap: Yes, sir.

The Court: —as to what judgment you all now propose.

Mr. Dunlap: That's correct.

The Court: That's what it comes down to, I believe that's fair to say, isn't it?

Mr. Stuckey: That's essentially correct.

The only trouble is, Your Honor, I came down to argue the other judgment, which Your Honor ordered me to show cause why it should not be entered, and I have had this new judgment one day.

The Court: Well, is there any change?

Mr. Stuckey: I wouldn't say there is any substantial change.

Mr. Dunlap: Your Honor, there is a substantial change. The substantial change is that it makes quite a few points raised in the Government's objections, namely, we have enlarged in the judgment the term "bread and rolls" to include all bakery products; and we have enlarged
330 tremendously the scope of the geographical effect of this proposed judgment to all Government installations, period.

The Court: Not to the general public?

Mr. Dunlap: No, sir, but to all Government—

The Court: You are still at odds over the general public?

Mr. Dunlap: Yes, sir.

The Court: Is that what it comes down to?

Mr. Dunlap: That's correct.

The Court: The difference between your two views, whether it should be—

Mr. Dunlap: I would say essentially that's the main difference. There may be some smaller differences; is that correct, Henry?

The Court: Well now, there was this right to enter and inspect. Someone had it—you had it three years
331 and he had it five the other time.

Mr. Dunlap: That's still a difference there.

The Court: There's still a difference there?

Mr. Dunlap: Three and five.

Mr. Stuckey: That was the affidavit, Your Honor.

The Court: Here is your Motion and it is file-marked the 11th.

Mr. Dunlap: Yes, sir.

Mr. Stuckey: Your Honor, I would also like to file an affidavit at this time.

The Court: Is that in line with the statement you just made?

Mr. Stuckey: Yes, sir.

The Court: All right. I was going to take it as a statement and treat it as an affidavit for all purposes. I mean, it's—

332 Mr. Stuckey: I have just prepared one.

The Court: —it's a statement seriously made.

Mr. Stuckey: Shall I proceed, Your Honor?

The Court: Yes, sir, I think so.

Mr. Stuckey: The three principal objections that the Government has to the defendants' proposed Decree are these:

1. The Government objects to the failure of the judgment to adjudge that the defendants have engaged in a combination and conspiracy in unreasonable restraint of interstate trade and commerce in the sale of bakery products, in violation of Section 1 of the Sherman Act.

2. The Government also objects to confining the scope of the Injunction to bids for supplying bread and rolls to United States Naval installations in the Jacksonville area.

3. The Government also objects to limiting the requirement of Section VI, that bids be accompanied by sworn statements of non-collusion, to a three-year period.

333 On May 8, 19—

The Court: What is the Government's position on this non-collusion matter?

Mr. Stuckey: We have a five-year provision.

The Court: Five year?

Mr. Stuckey: Yes, sir.

The Court: Well now, those—in other words, there are these two things: The dispute as to the three and five-years; (1) the right to enter and inspect.

Mr. Stuckey: No, sir, that's not enter and inspect; it's just—

The Court: I understand. This is requiring a sworn statement to accompany bids.

Mr. Stuckey: Yes, sir.

The Court: But wasn't there—isn't this right to—maybe I'm—

334 Mr. Stuckey: I don't recall any time period on that, Your Honor.

Mr. Dunlap: There is no time limitation on the period of inspection.

The Court: In either one?

Mr. Dunlap: No, sir.

The Court: In other words, you both agree that the Government be given that right by the injunction?

Mr. Dunlap: Yes, sir. There is no time limitation in either the one we proposed or the one that they propose.

The Court: All right. The three and five is as to the—

Mr. Stuckey: Affidavit.

The Court: —requirement of sworn statements.

Mr. Dunlap: Accompanying bids, yes, sir.

335 The Court: Non-collusive statements?

Mr. Dunlap: Yes, sir.

Mr. Stuckey: Yes, sir.

The Court: Well now, you go ahead. You have another objection, I think, haven't you?

Mr. Stuckey: Those are the three principal objections and I wanted to argue the legal points of them, Your Honor.

Mr. Dunlap: I believe those are set forth in the Statement of Objections, aren't they, Henry?

Mr. Stuckey: Yes.

Mr. Boman: And dated May 31st, 1962.

Mr. Stuckey: And the brief also accompanied that.

The Court: Well, as I understand it though, he is now willing to—I thought you had an objection as to geographical—

336 Mr. Stuckey: Yes, sir.

The Court: —limitations.

Mr. Stuckey: Yes, sir, that is correct.

The Court: Well now, that isn't one of these three you have.

Mr. Dunlap: That's Number 2; I think it's Number 2 on your statement, if you will read that, Henry.

Mr. Stuckey: Number 2, Your Honor, is the geographical area. It says:

"Jacksonville area."

The Government objects to confining the scope of the injunction to bids for supplying bread and rolls to United States Naval installations in the Jacksonville area.

The Court: Well, as to that, he now says he is willing to have it all Government installations, all over the world.

Mr. Ball: And for all bakery products.

337 The Court: And for all bakery products. So that comes down to a question of whether, it seems to me, whether the Decree should restrict their dealings with the general public as well as with the Government, or whether it should be limited to dealing with Government military and naval organizations.

Mr. Stuckey: On that point, yes, sir.

The Court: On that point. All right.

In other words, I think we would save time by recognizing the concessions they have made, since your objections were filed.

Mr. Stuckey: Yes, sir.

The Court: They have met some of your objections.

Mr. Stuckey: Yes, sir.

The Court: And let's view it as it is now instead of as it was May 31.

Mr. Struckey: I was trying to do that.

338 The Court: All right. Thank you.

Mr. Stuckey: They have corrected some part of the first argument that I have in that this was a consent judgment. I don't believe the word "consent" appears in their present judgment filed this week.

Mr. Dunlap: That's correct.

Mr. Stuckey: Is that correct?

Mr. Dunlap: That's right. And that, Your Honor, was based on the fact that in *Brunswick-Balke* also the word "consent" was not used and that fact is commented on in the write-up of this case in the Anti-Trust and Trade Regulations we just received this morning. They noted in that write-up that there had been a difference in the Brunswick-Balke in that, in that case, they merely moved for an entry of proposed judgment, avoiding the consent judgment label used by the bakeries in the Florida case.

I am reading from their comments.

339 Further, we have eliminated the "consent" portion of the judgment in the new proposal, which is listed as judgment.

The Court: Who are these people that are commenting on it?

Mr. Dunlap: This is the Anti-Trust—

The Court: They are commenting on it and we are here right on the scene.

Mr. Dunlap: This is the Bureau of National Affairs, Anti-Trust and Trade Regulations Report, from which we got the full text of the Brunswick-Balke case that we furnished Your Honor.

The Court: Yes.

Mr. Boman: What is the date of that?

Mr. Dunlap: It came in this morning; it's dated June 12, 1962.

The Court: Well, one of you, one side or the other, must have sent them this other for them to comment on.

Mr. Dunlap: I can say the defendants did not,

340 Your Honor. I don't know whether the Anti-Trust Division did or not.

Mr. Stuckey: I'm sure I did not.

The Court: I don't know, they may have read about it in the paper and got copies from the Clerk; I don't know.

Mr. Dunlap: That's right, Your Honor.

The Court: All right, sir.

Mr. Stuckey: Your Honor, in the absence of facts describing an admitted or adjudicated violation, the Court has no record on which it can determine the scope of relief needed to prevent further violations.

There is no precedent to support the granting of the defendants' proposed Motion. There is precedent, however, against it.

On April 20, 1960, Judge Wyzański dismissed a similar suggestion made by the defendants in the case of *United States* vs. *Lake Asphalt and Petroleum Company of Massachusetts, et al.*, Civil Action No. 59-786-W, District of Massachusetts, as "perposterous," saying:

341 "It seems to be preposterous for me to purport to act on the consent of one side over the objection of the other side without making findings. It seems to me to be an absolute violation of every rule that I ever heard of."

On June 17, 1960, the Court, in *United States* vs. *True Temper Corporation, et al.*, Civil Action No. 58-C-1159, Northern District of Illinois, granted the Government's Motion to Strike the defendant's Answer which denied the substantive allegations, but stated:

"For purposes of this case only, it will not contest these allegations."

And appended to the Answer a tendered formal judgment.

In only one case, to the Government's knowledge, has a court ever, in the absence of any admission of liability, testimony, findings of fact, or consent of the parties, entered a judgment over the objection of one of the parties. In that case, *United States* vs. *Brunswick-Balke-Collender, et al.*, Civil No. 59-C-163, Eastern District of Wisconsin, the Court, on March 27, 1962, at the request of the defendants entered a judgment against the defendants and did so over the objections of the Government. The Government has not yet filed a notice of appeal.

342 However, if appealed, whether the Supreme Court sustains the lower court or not, that case offers no

precedent for the instant case. In that case the judgment was entered as a result of extensive negotiations between the Government and the defendants which culminated in a judgment that went beyond the relief prayed for in the complaint. In fact, the defendants in that case agreed to all injunctive relief requested by the Government. The defendants objected only to a provision that would require them to admit liability and concede guilt in any treble-damage action brought by any State agency based on the same alleged conspiracy. The Court sustained that objection.

In entering the judgment without that provision, the Court granted injunctive relief of the precise breadths sought by the Government.

It is therefore obvious that the Brunswick case is not a precedent for the defendants' motion. They are now seeking to compel the Government to accept narrower injunctive relief than the Government believes the facts warrant. The Government has no objection to a resolution of this issue by the Court upon a proper factual
343 record. The Government insists only that it cannot be resolved by a comparison of the complaint and the proffered injunction, as the defendants would have the Court resolve it.

The granting of the defendants' motion would not be in the public interest. In addition to the fact that what the defendants are requesting violates every known rule of law or equity governing the entry of judgments, there are strong reasons of public policy why the judgment proposed by the defendants should not be entered in this case. In the Government's opinion the judgment proposed by the defendants shows on its face that it will not prevent future violations similar to the one charged in the Complaint.

First, the judgment fails to give what the Government would be sure of getting if it went to trial and won, that is, in addition, an adjudication of guilt.

The value of such an adjudication is indicated by the lengths to which the defendants have gone to avoid it. In this case and in a companion criminal case, the defendants are and were charged with illegally combining and conspiring to fix the price of bread and rolls sold to the Naval

installations in the Jacksonville, Florida, area. The
344 Government stands ready to prove the charge.

In the criminal case the defendants have escaped an adjudication usable in this case by pleading nolo contendere. Now, still unwilling to change their denials to Count II in the civil case but without offering to prove their innocence, they are asking the Court, in the absence of any facts, to enter a judgment over the Government's objection that would prevent any adjudication which the Government or any other party could use against them in this or any other litigation.

Second, in addition to an adjudication of guilt, the trial would result in the public exposure of the defendants' unlawful activities and such exposure is extremely valuable to the Government in connection with its efforts to enforce the Anti-Trust Laws and to engender respect for those laws by the community.

Third, if the case were to be tried, the Government would be afforded the opportunity both at the trial and at the hearing on relief to offer evidence in support of its claim for injunctive relief broader than that offered by defendants' proposed judgment. It should be noted that defendants' proposed judgment ignores Paragraph (C) of the prayer requesting that the plaintiff have such
345 further, general, and different relief as the nature of the case may require and the Court may deem appropriate in the premises. Even if there were no separate hearing on relief, if the Government's evidence showed a need for broader relief than that offered by the defendants, and we submit that it would, the Government would be entitled to such relief regardless of the specifics of its prayer.

Rule 54(c) of the Federal Rules of Civil Procedure provides in part as follows:

> "Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

While the Government may agree to a consent settlement of a civil case, it cannot properly agree to a consent

judgment which provides narrower injunctive relief than the nature of the violation charged warrants.

The charge here is bid-rigging in selling particular Government installations. The defendants having been caught in the act of defrauding the Naval installations in the Jacksonville area, it is extremely unlikely that that offense would be reflected in the same place in the same
346 manner. The defendants have offered no proof which would justify the Court in holding that a repetition of the offense in another place with respect to other products sold by them is unlikely. If the injunction is to serve any practical purpose, it must be broad enough to prevent such violations.

It is therefore the Government's position that the granting of the defendants' motion in this case would be contrary to sound judicial policy as well as the public interest in Anti-Trust enforcement.

The Government has offered to settle this case by the entry of a judgment which, in the Government's opinion, will serve the public interest. A copy of this judgment is on file with the Court. As the Court will notice, the proposed judgment is broader than that of the defendants in the following respects:

Section IV (B) and (C) of the Government's proposed judgment is comparable to Section IV (A) and (B) of the defendants' proposed judgment, with the exception that in the Government's proposed judgment the injunction against submitting rigged bids and allocating and rotating business applies to bakery products in general, rather than just "bread and rolls", and is not confined merely to the Jacksonville area.

347 In addition, Section IV (A) of the Government's proposed judgment contains a general injunction against conspiring to fix the price of bakery products sold to any third party; whereas defendants' proposed judgment relates solely to sales to United States Naval installations in the area.

Section V (B) of the Government's proposed judgment is comparable to Section V of the defendants' proposed judgment but, again, with the exception that in the Government's proposed judgment the injunction applies to bakery products in general and is not confined to the

Jacksonville area nor to sales to such Naval installations.

In addition, Section V(A) of the Government's proposed judgment contains a general injunction against "urging or suggesting to any seller of bakery products the quotation of charging of any price or other terms or conditions of sales of bakery products."

Likewise, Section VI of the Government's judgment is comparable to Section VI of the defendants', with the exception that the Government's proposed judgment is broader, requiring the submission of a sworn statement for a five-year period.

In some, the Government's proposed judgment is somewhat broader. But can it be said the Government
348 is unreasonable in being apprehensive that the defendants, having conspired to fix the price of bread and rolls to certain Government installations in a certain area, will not also attempt to fix the price of other bakery products to other Government installations in other areas?

The Court: Well, this part of your brief that you are reading there, is met by their concessions.

Mr. Stuckey: That's true.

The Supreme Court, Your Honor, in *International Salt Company* v. *United States*, 332 U.S. 392 at page 400, said this:

> "When the purpose to restrain trade appears from a clear violation of the law, it is not necessary that all of the untravelled roads to that end be left open and that only the worn one be closed."

In *Local 167* v. *United States*, 291 U.S. 293, at page 299, the Supreme Court stated:

> "The United States is entitled to effective relief. To that end, the decree should enjoin acts of the
> 349 sort that are shown by the evidence to have been done or threatened in the furtherance of the conspiracy. It should be broad enough to prevent evasion. In framing the provisions doubts should be resolved in favor of the Government and against the conspirators."

It is respectfully submitted that the defendants' motion should be denied in this case, Your Honor.

The Court: Well, let me ask you, with 54(c) providing that the Court should tailor the relief granted to proof, isn't this an old carry-over from equity pleading days when other and further relief—I think it's Paragraph (c)—isn't that just an antiquism or an archaism, or however you pronounce that word?

Mr. Stuckey: Yes, sir. I think there we have the same purpose but, Your Honor, there hasn't been any proof in this case.

The Court: When I studied equity pleadings in college, Judge Cockrell told us not just to pray for other and further relief; he said you should pray for such
350 other and further, or other, or further relief.

Mr. Miller: Be sure you get it.

The Court: To be sure that was all in there. But with the Rule that says that when the proof comes in that the Court is free to grant additional relief if the facts warrant it—

Mr. Stuckey: Yes, sir.

The Court: —it seems to me that putting that prayer in there is just sort of superfluous and I don't—what I am saying is that I doubt if the Government has asked for any more relief than what they have alleged in the Complaint entitles them to. We are not dealing with a situation that is discussed in these cases you cite, in the International Salt and these cases, where the right of the Court in its discretion after proof to extend the scope of an injunctive order is upheld. We are dealing with a situation where you have come in and made allegations of fact and asked for a specific ruling.

Mr. Stuckey: Yes, sir.

351 The Court: Where they have come in and offered to have a judgment entered against them, granting you the specific relief you asked for right straight down the line, and have now offered to meet the objections of your judgment section, and have now extended that offer to take in more products and more installations, give it greater geographical effect and also apply it to all bakery products.

Mr. Stuckey: I think the only argument left with this new judgment, Your Honor, is the fact that the Judgment Section wants the decree to go to the general public, not

just Government installations, and the three-year period extended to five years. I believe it can be summed down to that; at least that's the way I read it at the present time, without having much time to study it.

Mr. Miller: Your Honor, would it be proper for me to ask the attorney for the Government whether or not the Judgment Section proposes to dismiss Derst Baking Company as to Count II also, because I don't think there is, even by the stretch of the imagination of
352 the Government and their apparent presumption of guilt that they follow in Washington, could they assume that Derst Baking Company has been a party to a conspiracy involving prices to the general public.

The Court: Because they weren't a party to the—

Mr. Stuckey: Indictment.

The Court: —to the general public indictment.

Mr. Miller: Yes, sir, that's right.

The Court: Well, what would you—assuming that I said, "All right, Mr. Government, we will enjoin these defendants both as to dealing with Government installations and dealing with the general public," you would suggest then that everybody else be enjoined in that fashion and that Derst only be enjoined as to Government installations; is that what you suggest?

Mr. Miller: No, sir. The reason that I posed that question was to merely high-light the unreasonableness of the Government's position and to emphasize that in this
353 case that the Government has committed themselves to by their pleadings, it would be improper in the trial of the case to bring in any evidence with regard to price-fixing to the general public, with Derst Baking Company being a party defendant. Without bringing in evidence of price-fixing to the general public, I don't see how the Government can take the position that—before Your Honor and this status of the case—they are entitled to a broad decree against all defendants as to price-fixing to the general public.

The Court: Since one of the alleged conspirators hasn't, we can say, using the term roughly, hasn't had a day in Court on that proposition.

Mr. Miller: That's true. And the Government hasn't even contended that one defendant has been a party to any

price-fixing to the general public. And of course, the Government has already conceded that in effect, I think, that Derst Baking Company doesn't even do business in Florida, so it couldn't have possibly been a party to a conspiracy to fix prices in the State of Florida as to the general public. So my raising that point, Your
354 Honor, was not to propose any different treatment of Derst Baking Company and any of the other defendants. My purpose in raising the point was merely to ask Mr. Stuckey if he contends that, if he is to make a record in this case, does he contend that he is entitled to bring in evidence of price-fixing to the general public as to any defendant, with Derst then in the case?

The Court: Maybe he will want to—

Mr. Stuckey: I would contend, Your Honor, that the Government could bring in that type of evidence in a hearing on relief, probably not in the trial of the case but certainly at a hearing on relief if the Government won.

Mr. Dunlap: Your Honor, I think this pinpoints the difference. They have pleadings here in which they bodily left it out of the criminal proceedings on bidding to Government installations. Now, they could have well pleaded, if they wanted to, a different conspiracy and different facts, and asked for such relief; but they limited themselves here by lifting that one out, and on those same facts they are almost identical—they are identical prac-
355 tically, with what they based the criminal proceedings which was limited strictly to Government bidding to these installations in northeast Florida and southeast Georgia, Glynco and Naval Air Station.

Now, it looks like to me that if you try to bring in—say we are adjudicated guilty in that, and that's in effect what this proposed judgment does, we have given them all the relief on that set of facts that any conceivable evidence, we feel, could be brought in.

I don't see how on those allegations that the Government can come in and present any evidence of some other violations somewhere without setting it up in their pleadings and properly appraising us of what it is. We wouldn't even know what we were going to meet. It would be a complete surprise. We wouldn't know pleadingwise what in the world his evidence would be, and certainly we feel

we have gone beyond anything that's required and what he has asked himself.

We didn't limit the Government in filing these pleadings. We say, once they have filed them, that they ought to be required to limit their proof to the basis on which they filed their Complaint. And I think that it certainly could not be contended that we haven't gone beyond any—
356 that we have, in this amended judgment, given the relief which the furthest relief or the broadest circle of relief that the Court could grant at a trial of this case.

Mr. Blackshear has prepared to argue more on this point, Your Honor, and I was—our argument was divided, I was more or less going to fill in the facts and then Mr. Blackshear present the argument.

The Court: Let's go ahead and have the argument.

Argument by Mr. Dunlap

Mr. Dunlap: All right, sir.

Your Honor well knows the history of this case. There was a criminal indictment on the Government bidding and the payment of a fine. Then bodily lifting out those same allegations as to the Government bidding in the criminal case, they placed them in a civil case and brought two counts; Count I, which involved the False Claims Act, and Count II, asking for injunctive relief.

We settled Count I, which meant that we paid twice in this matter—once to the criminal side and once on the civil side—for the same set of facts; and that left the injunctive relief.

At the last Pre-Trial hearing, as Your Honor will
357 recall, we had a full discussion of CountII and the defendants filed their Motion for Judgment, which is somewhat narrower than the proposed judgment contained in the plaintiff's—rather, the defendants' Motion for Amendment.

Now, at that last hearing, Your Honor, remember we cited two cases. The Government overlooks one. We cited *Brunswick-Balke* and the *Aero Mayflower* case, which I gave Your Honor a copy of, which was entered by Frank Scarlett. Those two cases are on the books; they are both to be found in reported cases, where the Court in its equity jurisdiction has entered a judgment over objection of the

Government, the Government making the same objections in those cases that they are making here. I will let Mr. Blackshear argue that a little more extensively but—

The Court: Well, would you concede that his point about Brunswick is well taken as to—factually as to what was eliminated in the decree from what the Government wanted? They wanted—I gather from what Mr. Stuckey says that in the Brunswick the Government had—in the Government's proposed decree, they had a provision that in any treble-damage suit by private parties, they
358 would—the defendants would admit liability and concede guilt brought on the same set of facts.

Mr. Dunlap: Your Honor—

The Court: That is—

Mr. Dunlap: Excuse me.

The Court: And that is the part that was eliminated rather than any enlargement of the facts of the complaint or the prayer.

Mr. Dunlap: I don't have the full facts, Your Honor. It appears from what we have before us that from the opinion of Judge Tehan that would appear to be correct, but I would call Your Honor's attention that under the statement of the objections, the first Government statement of objections, that identical point was in the Brunswick-Balke case.

The Court: What I'm getting at is that if that's all that was eliminated, I don't see how that Judge could be defaulted for cutting that out because, when you enter
359 —it just seems to me to be a grossly improper provision for a decree that from this time forward that anybody that comes in with treble-damage suit that we are going to admit guilt and concede liability, based on the same transaction. And that's tying them down to, that's denying them a day in Court on anything that any private party wants to dream up and bring them in there on. And the force of the Brunswick case as persuasive precedent is strongly diluted, very much diluted, if that's all that was taken out of the Government's demand there.

That's a lot different than saying that the Government can come in and inspect. That's saying that from henceforward you have got to come in when anybody points a gun, you have got to drop dead whether you feel like it or not.

Mr. Dunlap: Well, Your Honor, on that point, let me say the Brunswick case to me has two things: The first thing, it certainly is a direct holding against the Government that in no event over the objections of the Government can the Court enter a decree which is in effect called a judgment or which is analogouse to consent judg-
360 ment. That's the first point that they made in the Brunswick case, that the Court was without power to do it.

The Court: He makes that.

Mr. Dunlap: I say that's his first point in the Statement of Objections.

The Court: Yes.

Mr. Dunlap: So it certainly stands for a precedent on that point.

Now, we come down to an exercise of the Court's power, and I believe that's where Your Honor is talking about now.

Now, I don't know—I don't have the Brunswick case before me, but I believe that it may well show that what the provisions, the other injunctive provisions, were certainly—had some relation to the facts as filed in the complaint and the prayers asked for on the Government in that case.

Now, unfortunately, we don't have the record here but I think that the main thrust of it is that the Court does have the power over the Government objections to
361 enter this decree, and once it's conceded, it's out; then we are to the point of the exercise of the Court's power. And I concede, Your Honor, that Judge Tehan's opinion does show that, outside of that one provision, everything else was agreeable between the parties. I would not dispute as to that. But still the Government objected and that was part of what they wanted, and the Court said:

"We are going to enter it anyhow."

And by the way, Your Honor, the Government in their brief says that case has not yet been appealed, and their brief was written on May 31st. The opinion was on the 27th and I believe it is a sixty-day period, so if it hasn't been appealed, it looks to me like they have been caught by the sixty-day statute on that matter.

The Court: Well, knowing the Government, on the fifty-ninth day they file a Notice of Appeal and it's still sitting up—they will wait until the thirty-ninth day after that to decide whether to go to work on the record. If they do, why then they will come in and ask the Judge to extend the time for lodging the record in the Appellate Court. They—

362 Mr. Dunlap: The reason I said that, Your Honor, usually this service picks up those notices of appeal, and I understand that's one thing that cannot be extended, the filing of the Notice.

The Court: The filing of the Notice, no.

Mr. Dunlap: They usually pick those up.

The Court: What they do is file that Notice and let it sit there until the time for lodging the record in the Appellate Court is about to expire and then come in and get an extension to ninety days for that, and they still don't decide.

Mr. Ball: The point we make though, Your Honor, is that on the 31st of May, which was then after the sixty-day period had expired, they said they hadn't then decided to do that.

Mr. Dunlap: The brief says that.

The Court: Well, the brief writer, he may not be advised. Up there in the Department of Justice, there

363 are thousands of lawyers.

Mr. Dunlap: Your Honor, we had those two cases before you.

Mr. Stuckey: I think you hit the nail on the head.

The Court: The Government's right hand doesn't know what its left hand is doing always.

Mr. Dunlap: After we filed our Motion with Your Honor and had the discussion of the Brunswick-Balke and the Aero Mayflower cases, the Government then filed its objections 1, 2, and 3; the first objection being that they were entitled to an adjudication of guilt. That was the same argument they made in Brunswick-Balke and the Court said:

"That's the very thing you are not entitled to, to be used against you."

If you will read the second page of the Brunswick decision, you will notice they made the same argument.

Secondly, they made the objection that the Government objects to confining the scope of it to bread and rolls and to a certain limited geographical area. We have met that.

364 The third one is a three-year period rather than a five-year period. That was based on the facts in *Carey Salt*, which the Government entered into, which was a bid-rigging case; they agreed to a three-year period.

Then in their brief, Your Honor, when it comes down to what they are really afraid of, and I take it the injunction—Mr. Blackshear here will present a more extensive argument as to what the proper scope of the injunction is. At the bottom of the Government's brief, on page 6, they sum up what they really are afraid of in future violations, and I would like to read it to Your Honor.

> "In sum, the Government's proposed judgment is somewhat broader. But can it be said that the Government is unreasonable in being apprehensive that the defendants, having conspired to fix the price of bread and rolls to certain Government installations in a certain area, will not also attempt to fix the price of other bakery products to other Government installations in other areas?"

They say not one word about anybody fixing prices to anyone other than other Government installations

365 in other areas. The only reference to the public is when they say that one difference between their decree and ours is that theirs relates to the general public. But when they talk about what they are afraid of, about being apprehensive about, there is not one worry in their brief about being apprehensive that we are going to fix prices to the general public.

Then after the defendants received the brief and the statement of objections, we sat down and honestly tried to figure out what the broadest possible injunction was that the Court would be able to grant on the cases if Mr. Stuckey was able to prove everything he alleged in his complaint and bring in all evidence on the relief which

would in any way be admissible in this state of the pleadings and under the case as it's filed before Your Honor.

Then we filed a motion to get the Court's permission to file our amended motion, to which we appended the affidavit of Mr. Blackshear and the amended proposed judgment. And the purpose of the affidavit of Mr. Blackshear was to give in the record a history of the negotiations, a history of the various viewpoints of the Government and the defendants, to show that we had made every good faith effort to give the Government everything
366 to which they were properly entitled and which they would get upon a trial of this case.

And that brings us up to the present argument and we believe, Your Honor, that the new amendment gives the Government everything to which they are entitled on this record under any conceivable evidence which would be proper and material upon proving this complaint.

And I would like now, with the Court's permission, to defer the argument, the rest of the argument, to Mr. Blackshear.

Argument by Mr. Blackshear

Mr. Blackshear: If Your Honor please, the argument that I plan to make is not going to be near so lengthy or so elaborate as my brother's introduction would perhaps lead the Court to believe.

We have prepared a brief, copies of which have not yet been served. If I may, I'll pass this on to the Court and just give Mr. Stuckey a copy.

Mr. Stuckey: Your Honor, I'm certainly put under a disadvantage. After an argument, I'm handed the defendants' brief in this case. Our brief has been on file for two weeks, and here I'm served with a brief after I make an argument.

367 The Court: Well—

Mr. Blackshear: This is a reply brief, Your Honor.

The Court: I understand. Of course, if after hearing you, if I decide it's necessary, I'll give you a reasonable time to reply to it. The Show Cause Order didn't lay out any rules for serving briefs. It just fixed—I believe it fixed a date for you to file objections. Maybe that was left

until the return date of the rule. I don't know that; I'll have to verify that. June 1 was the date fixed.

Mr. Dunlap: Yes, sir.

The Court: And that you complied with. You were directed to file written reply on or before June 1st; nothing said about accompanying brief or any time they should file reply brief. At the hearing it seems to be timely to me, with the reservation that if it is necessary in my judgment, I would give you leave to reply to theirs.

Mr. Stuckey: I wasn't going to make any formal exception to it.

368 The Court: Yes.

Mr. Stuckey: But I just say I'm under a disadvantage when I have one day to study an amended consent judgment, when I'm ordered by June 1st to reply to another judgment. That's why my brief was directed to the other judgment, because I actually haven't had time to study this material. I only got it yesterday.

The Court: It was filed here on the 11th and you got it in the mail yesterday before you came down here?

Mr. Stuckey: Yes, sir.

The Court: All right, sir. You may proceed.

Mr. Blackshear: If Your Honor please, we feel that it's important to keep in mind that the injunction that is provided by Section 4 of the Sherman Act is an injunction which is to be exercised and to be governed by traditional principles which are contained in equity proceedings.

The Courts have uniformly held that it's necessary for the Government in such an injunction suit to show a threat of a violation of the law. Cases so holding include

369 *De Beers Consolidated Mines* v. *United States*, in 325 U.S. 212, pages 218 and 219; *U. S.* v. *National City Lines*, a District Court of Illinois decision, 1955, reported in 134 F. Supp. 350, at page 355.

I am at the third division of my brief, argument and authorities. The pages are not numbered in this brief.

The purpose of an injunction by the Government under 15 U.S.C.A., Section 9, and that is Section 4 of the Sherman Act, is to prevent future violations and before relief must be granted, in the language of some of the Courts, there must be some cognizable danger of violation in the future.

Among the other cases so holding are *United States* v. *W. T. Grant Company*, in 345 U.S. 629; and *United States*

v. *Oregon State Medical Society*, a 1952 decision, reported in 343 U.S. 326; and another opinion in *United States* v. *National City Lines*, reported in 118 F. Supp. 465, at page 467.

In this brief, we have stated that there is a motion to dismiss Count II as failing to state a claim on which relief can be granted, because there is no statement in this Count showing that there is any cognizable danger of repetition. And in the brief we have suggested that
370 perhaps the Court ought to pass on that Motion to Dismiss before acting on the Motion here.

After consultation with the other defendants, we wish to change that now. We wish to say simply that, if the Court is disposed to grant our Motion to enter a judgment on our confession, then it should do so without first acting on the Motion which was previously made, and of course it would be rendered moot.

In the second of these two decisions, in *National City Lines*, the one reported in 134 F. Supp. 350, Judge Hoffman stated, at page 355, and I quote:

> "Consideration of the proper breadth of the decree which may be entered requires that a delicate balance be struck. On the one hand, the relief afforded must be adequate to meet the need. An injunction must be broad enough to prevent a repetition of the wrong, and a mere deviation in the method by which the same evil is accomplished cannot be permitted to evade the prohibition. Accordingly, a decree may close all roads to the prohibited goal, and is not confined to the well-worn road."

371 Citing the *International Salt Company* case.

> "The Judge, in assuring the public freedom from the illegal conduct, may range broadly through practices connected with acts actually found to be illegal."

Citing the *United States* v. *United States Gypsum Company*.

> "On the other hand, a finding of an offense under the Anti-Trust Laws does not invest a court with a license to embark upon a general program of compre-

hensive control of the defendants' business. The limits of the controversy must be observed. The court is bound by the first principles of justice not to sanction a decree so vague as to put the whole conduct of the defendants' business at the peril of a summons for contempt. We cannot issue a general injunction against all possible breaches of the law.' "

Citing *Swift & Company* v. *United States*, reported in 196 U.S., at page 375.

" 'The mere fact that a court has found that a defendant has committed an act in violation of a statute does not justify an injunction broadly to obey the
372 statute and thus subject the defendant to contempt proceedings if he shall at any time in the future commit some new violation unlike and unrelated to that with which he was originally charged.' "

Citing *N.L.R.B.* v. *Express Publishing Company*, 213 U.S. 426.

"To range far beyond the hard facts—"

The Court: That must be 313 U.S.
Mr. Blackshear: That perhaps is correct.

"To range far beyond the hard facts of the questions actually tried in the case is to invite the errors of a broad rule which proves unjust in the light of unforeseen circumstances. The court is constrained, then, to steer the narrow course between the hazards of a failure to cure the evil on one side and unwarranted and oppressive control on the other. In its essence, the principle involved is simply that we should not attempt to accomplish in a single suit what should fairly be left to a later action when and if it proves necessary.

373 "In reviewing the language of the plaintiff's prayer for relief in the light of these considerations, the reader must take into account the nature of the offense charged and actually litigated by the parties. Under the liberal provisions of Rule 54(b) of the Federal Rules of Civil Procedure, the plaintiff is not bound

to prove all that he alleges, nor is he limited in a judgment in his favor to the relief he has demanded in his complaint. Under that Rule, a litigant is to be awarded whatever relief the facts as litigated entitle him to. But in determining what is fairly within the boundaries of the controversy, the distinction between a civil action brought on behalf of a private person cannot be ignored. 'The Government seeks its injunctive remedies on behalf of the general public; the private plaintiff, though his remedy is made available pursuant to public policy as determined by Congress, may be expected to exercise it only when his personal interest will be served.'"

Citing the *United States* v. *Borden Company*, in 347
374 U.S. 514.

"Reasonable limits are set for the private suit by the limits of the plaintiff's interest at stake, and the defendant is put on general notice by the nature of the opposing litigant to the extent of the possible controversy. But when the Government is the civil plaintiff, the scope—"

The Court: She covered too far here, didn't she? Didn't she cover too far here?

Mr. Blackshear: Perhaps so, but I think this next sentence is right in point:

"But when the Government is the civil plaintiff, the scope of the interest to be protected by an injunction is as broad as the national economy. In such cases, principles of elemental fairness demand that the bounds of the issues relating to injunctive relief be determined with reasonable certainty by the pleadings."

Now, we think that the Court should—that Rule 8-A of the Rules of Procedure throws light on the problem
375 we have here. That Rule in its pertinent part provides that a pleading which sets forth a claim for relief shall contain a short plain statement of the claim showing the pleader is entitled to relief and demand for judgment for relief to which he deems himself entitled.

Of course, the Rules of Procedure stay away from the use of the term "facts" in talking about pleadings. However, if I may use the word "facts", this Rule states that what the plaintiff is entitled to depends on the facts which he sets out as descriptive of his claim, read in connection with the prayer for relief.

Now, the facts in this Count, as set out by the Government, are that these defendants have violated only by allocating the business of supplying two Naval Air Stations and rigging the bids that were furnished on the invitation of those two Naval Air Stations to supply bread and rolls to them. That is all of the facts on which the Government predicates its relief.

They do not say that these defendants threatened to violate in that way or in any other way in the future, but if there is any implication that there is a cog-
376 nizable danger of future violation, it is the implication that arises from the fact that they have violated in this respect in the past.

Now, certainly we recognize that under certain circumstances, any plaintiff in an injunction suit is entitled when his right to some relief has been established by proof or by admission, the plaintiff may nevertheless be entitled to introduce evidence so that the Court can exercise its judgment wisely in deciding what nature of injunctive relief is necessary to remedy the danger.

However, in this particular case, if the Government wishes the privilege of introducing evidence showing what relief it needs, it certainly has not set that out in response to Rule Nisi.

Our Motion must certainly be taken as admitting, for purposes of entry of judgment, all the facts that the Government has set out in Count II. Certainly if we give them the judgment they are entitled to, we say you can treat the things they say we did as if they had been proven, or as if they were admitted; and when that is done, if there is still some reason why the Court cannot intelligently exercise its judgment in granting injunctive relief without receipt of further testimony, you would
377 expect the Government to come in and set that out by way of response to the Rule Nisi and to state where and how the Court can't act just on the resolution

of the facts set out in Count II and why it's necessary to consider other facts, and what other facts are to be considered to show the scope of the relief.

But it seems to me that there is implicit in the Government's position all the way through that once a defendant has been shown to have violated Anti-Trust Laws that then, simply by virtue of that fact, the Government is entitled to an injunction which will restrain him from any other violations, and we submit that that is not the law and the cases do not so hold.

Now, we contend, on the authority of the Brunswick-Balke-Collender case and on other authorities, that Congress has set a policy that is designed to encourage defendants in both criminal and civil Anti-Trust cases to come in and capitulate promptly to the Government's demand, and that the policy set by Congress provides that when defendants come in and yield immediately to what the Government has demanded, then the judgment entered on that consent shall not be usable against them in any
378 treble-damage suits by third parties. And we say that that is what we have done.

Now, the Government's position seems to be that the Department of Justice has got a discretion and that they can withhold this privilege from defendants to whom they do not choose to grant, but as Judge Tehan has pointed out in the Brunswick-Balke, nothing in the legislative history of this Act, nothing in the language of the Statute itself, shows or implies that this right is at all qualified and that the Department of Justice has any discretion whatsoever as to giving defendants the benefit of this right.

The Government also seems to take the position that in order that there may be a consent judgment, the defendants must not just capitulate to the claim made in the civil suit but they must come to terms and must get a further agreement from the Department as to the scope of the relief.

Now, if Your Honor please, if that be the law in civil cases, then you would expect it also to be the law as governing consents in criminal cases, and yet in *Twin Ports Oil Company* v. *Pure Oil Company*, 26 F. Supp., at page 366; and in *Barnsdall Refining Corporation* v. *Birnamwood Oil Company*, 32 F. Supp., at page 308,
379 at least in those two cases, the courts have held that

a nolo plea to a criminal indictment is a consent judgment or decree within the meaning of Section 5 of the Clayton Act, which contains this enunciation of the Congressional policies that I have just been describing.

In the *Twin Ports Oil* case, the Court said, page 376:

> "In effect, Congress said to the law violator, 'It is to your advantage to capitulate to our demand before any testimony is taken in any equity or criminal proceedings. If you fail, and a decree of judgment is entered against you, such decree or judgment will constitute prima facie proof to any or all private litigants who may have been injured by your unfair practices.' That the expediency of the plan appealed to Congress and that it intended by the provisos to encourage consent judgments in criminal cases, as well as equity proceedings, can scarcely be gainsaid in view of the Congressional record."

In the *Twin Ports Oil* case, it was apparently contended that it was anomalous to speak of a consent judg-
380 ment in a criminal case, but addressed to that part at page 372 of the Twin Ports case, the Court said:

> "However anomalous the term 'consent judgment' in a criminal proceeding may be, it must be conceded that Congress unmistakably intended to include judgment entered on pleas of guilty and pleas of nolo contendere in pending cases as consent judgments if entered forthwith after the adoption of the Act. . . ."

And it is quite familiar and it happened in this case that the offer of a plea of nolo contendere was not acquiesced in by the Department of Justice and the Department has resisted.

Now, one other point and I believe I can conclude my argument:

A great deal of stress has been put upon such cases as *International Salt* and *Local 167* v. *United States*. The Government's memorandum quotes from these cases and deals with the right of the Court to close the so-called untravelled roads and to enjoin against types of acts somewhat different from the acts which have been charged

as past violations, but I want to point out this about
381 International Salt Company. International Salt Company, and I think Local 167—what I'm about to say also applies to the facts in Local 167. In those two cases, the defendants had been charged with a broad general conspiracy to monopolize.

In Local 167, I recall that it was said that this conspiracy had been well financed; it was very extensive and it ramified into all aspects of the poultry business, as I recall it.

And so the Court said:

> "This is not only appropriate to destroy this monopolization, to enjoin against the specific overt acts in furtherance of that conspiracy, but to enjoin against other acts which it is quite likely will be undertaken in furtherance of that conspiracy."

The key language, I think, appears in the International Salt case, in the very quotation that the Government uses. And that says:

> "When the purpose to restrain trade appears from a clear violation of the law, it is not necessary that all
382 the untravelled roads to that end be left open."

And there, past violation showed a general purpose to restrain trade.

Now, what are the facts in the case at Bar? It has not been suggested that the bid-rigging and allocation of the Navy business among these defendants was any part of any broad general conspiracy.

It has not even been suggested that anybody over the level of local plant manager of these four companies had any awareness whatsoever of what was going on. It was something that was complete within itself.

Now, Mr. Stuckey pointed out at the time of the pleas in the criminal cases that several of these defendants have a good many plants located in other areas; a purely local conspiracy at the plant manager level simply as to how bids were to be submitted on supplying these two Naval Air Stations can't possibly be said to constitute any threat, for example, for these bakeries or some of them to get

together and conspire to fix prices in the Chicago area for the sale of bread, or in any other area. The mere fact that they have been law violators in the past in one particular is no reason or no threat as to a possible violation in these other areas and in other sections.

383 And those are the reasons why we insist that what we have offered by way of injunction is everything that the Government could conceivably be entitled to after a trial and after proof of all the facts they have set out.

Now, I think, as already has been demonstrated—it has already been demonstrated in Mr. Dunlap's argument and authorities how the Government is not entitled to an adjudication of guilt. The other reasons that they are saying why the Government—why the judgment we offer is contrary to the public interest is because they say it deprives them of the right to have the spectacle of a public trial, in that that is advantageous to the Government in enforcing the Anti-Trust Laws.

If Your Honor please, I think that argument is entirely frivolous. Any litigant who comes into Court and sets out a claim to certain relief and is met with the reponse, "We give you all the relief you are entitled to", certainly has no vested right under any law which I am familiar with to say, "Oh yes, although you are willing to give me all the relief I ask, I still would like to have a trial because I would like to get the newspaper publicity and benefit that flows from such a trial."

. . . . . .

389 **Argument by Mr. Boman**

Mr. Boman: It's really a summation that I think we all know but it may be just stating it in other words; the position of the inequity in this whole situation that has developed starting back in October, 1960.

The Judicial Conferences and others have been trying for really years, Your Honor, as you well know—these so-called big cases, Anti-Trust cases, how they congest the docket and eat up the time of Government counsel and defense counsel and the courts and everybody, the jury and others—to find some way to expedite so that the end of justice will be served.

I think from an equitable position that these bakeries have manifested uniformly throughout that they have tried to the best of their ability; when the punishment end of it came up, they did not fight and they were punished by the fine of the Court and paid it.

When the Government next sought in Count I its damages to be made whole for the loss, Your Honor knows that Count I too, with its very questionable points of law, were acceded to by the defendants and the damages
390 were paid.

And now we are down to the third round and I hope the last one in trying to be put in an equitable position of submitting to the Court voluntarily more than the Government has sought in its own Petition, and I think, Your Honor, when you look at the whole picture that way, that the equities balance toward the entry of a decree that the defendants have proffered to Your Honor.

Mr. Dunlap: Nothing further.

Mr. Ball: Nothing.

The Court: Would you like an opportunity—You indicate you don't care to reply to the argument. Would you like an opportunity to reply to the brief?

Mr. Stuckey: I don't think so, Your Honor; I think this case has been briefed enough.

The Court: Well, I would—

Mr. Stuckey: I would like to reserve that privilege to take up with my superiors, if they would like to reply to it.

391 **Colloquy Between Court and Counsel**

The Court: Well, here is the position as I see it:

The plaintiff was directed to respond to this Rule as to why the proposed Decree, that proposed by the defendants, should not be entered. And you were directed to object in writing by June 1st; the plaintiff was.

Now, two or three days before the hearing, the Motion is filed asking leave to amend the defendants' Motion to enter a Final Decree and proffering slightly—oh, I wouldn't say slightly, but proffering a decree granting broader relief than that first indicated they were willing to consent to.

In fairness, it seems to me if I grant the Motion, which I think I should do to permit them to proffer this Amended

Motion with the further Amended Decree, I should give you an opportunity by brief or by written objections or in some form to put in the record before me the objections that you may have to the granting of this one.

Mr. Stuckey: I might say at this point, Your Honor, that I don't believe anybody in the Department has seen this group of papers except me. Maybe Mr. Kilgore would like the opportunity you afford him now.

392 The Court: They have met—in effect they have met some of the Government's demands as to what should go into this Decree; they have not met the others. It seems to me—Let me ask if this is a correct statement: That if the—well, let me ask this first:

In what you call the adjudication of guilt, what is the gist of the provisions there?

Mr. Stuckey: That's only after trial, Your Honor; after trial. And you would have to adjudicate—

The Court: You are not contending that there should be an adjudication of guilt in this—

Mr. Stuckey: Decree.

The Court: —in this Decree?

Mr. Stuckey: No, sir.

The Court: In other words, you are following—in effect, following Section 5, saying it does not—

393 Mr. Stuckey: I don't see how there can be an adjudication without taking of evidence.

The Court: Well, it comes down then, it seems to me, to whether—to just simply two points, as to whether the sworn statement that's required of them be limited to three years or five years; and the other point as to whether all bakery products—I mean, as to whether sales to the general public as well as to the Government installations should be brought under the injunctive decree. There are just those two points.

Mr. Stuckey: That's the way I interpret it, Your Honor.

The Court: As this is now entered.

Mr. Dunlap: Your Honor, we have had a quick caucus between us and we are willing—the three or five years is not of major importance and we would be willing to—

The Court: Go to five?

Mr. Dunlap: Go to five. However the Court

394 wants to do it either on the record on an instanter motion—

The Court: That's something that, if the case had gone through trial and it was decided that that was a right that should be accorded the Government, it would be a discretionary matter to say you'd better give it to them for three years or five years. It would be something that—It's just like in one of these criminal cases where we either put a defendant on probation for three years or five years. If you think his rehabilitation could be accomplished in three years with supervision, why, you give him three. If you think you have got to watch him for five, why, you make it five.

In other words, that seems to me, since it would involve the exercise of discretion after hearing and on judgment based on findings after hearing, that it is pretty much discretionary now.

Mr. Dunlap: Yes, sir.

The Court: Well, sir, if you would like then, I'm prepared to say that I'll consider that, either further written objections or a reply to this brief filed today within
395 ten days, and then possibly to enter an order.

Mr. Stuckey: All right, sir.

Mr. Dunlap: Will that be enough time, Henry? Ten days?

Mr. Stuckey: I think—

Mr. Dunlap: Thirty days is all right with us.

Mr. Stuckey: I think I would probably prefer the longer time.

The Court: All right. Make it thirty days. And it's understood that those will be considered without any further hearing and without any further reply.

Mr. Dunlap: Yes, sir.

The Court: Without further reply by the other side. I think we've got to bring an end to this thing.

Mr. Dunlap: Yes, sir.

Mr. Stuckey: All right, sir.

396 Mr. Dunlap: Your Honor, I believe, in reciting the Order that will be entered, our Motion for Leave to File Amended Pleadings would be granted; is that right?

The Court: Yes. I am perfectly willing to enter that sort of intermediate or interlocutory order now, dealing with these affidavits and dealing with this June 11 Motion.

Mr. Dunlap: Yes, sir.

The Court: And set up that final action will be taken after this thirty days, if somebody will draft that sort of an Order and present it. Maybe we ought to make a record in the file of that.

Mr. Dunlap: That's what I thought, Your Honor; record what action, in effect, you were taking today.

The Court: And you can say your brief is received at the hearing, your brief and your changed position as to what you are willing to agree to are what he primarily wants, he may want to meet.

397 Mr. Stuckey: If the Department does not wish to file a reply brief, shall I just notify you by letter?

The Court: Well, I would be glad if a decision is reached and under thirty days not to do anything—

Mr. Stuckey: That's what I was going—

The Court: —by letter or by some sort of paper that you could put in the file, entitled, "Consent to the entry of Decree without further—"

Mr. Stuckey: I couldn't do that.

The Court: Well—"to the consideration of the entry of Decree."

Mr. Stuckey: Yes, sir.

The Court: Or a waiver of the right—you can call it waiver of the right to reply or object.

Mr. Stuckey: All right, sir.

398 The Court: And mail that to other counsel and mail it to the Clerk so it is something in the written record, rather than a letter, is the only thing I had in mind.

Mr. Stuckey: All right, sir.

The Court: In other words, the terms of the Order ought to be met by something else that's filed, and if something like that is lodged I would consider myself free to go ahead and not wait the thirty days.

Maybe after you get up there, why, Mr. Kilgore will be—

Mr. Stuckey: I'm going on a month's vacation on June 29th.

The Court: June 29?

Mr. Stuckey: Yes, sir.

The Court: Maybe we ought to make it fifteen days then.

Mr. Stuckey: Then I know I won't get any vacation.

399 Mr. Miller: Your Honor, I have one question to ask:

In your last discussion about whether the requirement of filing affidavits with bids should be for three years or five years, you made reference to the matter that it would be discretionary after hearing evidence.

I wondered whether it would be of any assistance to the Court if the defendants would amend, by written amendment, or amend instanter, the proposed Decree to make it five years to meet the objection of the Government?

The Court: Well, let's do it by instanter amendment and interlineation, if it's all right.

Mr. Dunlap: All right, sir. I think all you have to do is change our three to five.

The Court: In what paragraph?

Mr. Dunlap: That would be in the proposed judgment, Your Honor, if I might come here —

400 The Court: At the top of page 3?

Mr. Dunlap: Yes.

The Court: Roman V?

Mr. Dunlap: Roman V.

The Court: To five years. You'll probably get in the habit of doing it and keep on doing it after three years anyway.

Mr. Miller: That's true.

The Court: Now, there is one other thing, this question of your Motion to Dismiss Count II.

Mr. Dunlap: Mr. Ball was to be the spokesman, since he was principal arguer of that in the other hearing we had, Your Honor.

Mr. Ball: Your Honor, our position on that is primarily that if Your Honor is going to entertain and grant the judgment that we have requested in the now amended

401 form, that we would consent to the entry of an Order denying that Motion.

On the other hand, if Your Honor is not going to do it, we want to argue and we want to argue it vigorously and we would like to have a full-scale hearing on it. And in that event, we would like to request the Court to grant us more time within which to file a brief. We have now—

The Court: I don't know; my inclination is to say this: That if you are going to put your head on a chopping-

block, you ought to do it without reservation and let me deny the Motion to Dismiss today and this Order be entered today. That's how I would feel about it. And then—

Mr. Stuckey: We have already argued that.

Mr. Ball: It has been argued.

Mr. Dunlap: It has been argued. It will be just a question of filing briefs.

The Court: It was argued; I understand that.

402 Mr. Dunlap: Yes, sir, it was argued.

Mr. Miller: Your Honor is not asking us to consent to your—

The Court: No, I'm not asking you to consent but—

Mr. Miller: Just consent that it is right to be decided?

The Court: It's right to be decided and not file any more briefs and let this be my action denying it, to put it in this Order that Motion to Dismiss is denied.

Thirty days are going to take you to about July the 8th, or whenever it is, anyway. You are going to have another hiatus about not knowing what to do about filing briefs; let's just deny it.

Mr. Dunlap: All right, sir.

The Court: I think you are in an anomalous position as long as you are urging it anyway.

Mr. Dunlap: Yes, Your Honor.

403 Mr. Ball: I think so.

The Court: Because you are coming in and offering to grant all relief asked in one breath, and in the other breath saying it isn't a claim on which relief can be granted. I think you just let me go on and deny it.

Mr. Dunlap: I think it, in order to straighten out the record, we will say defendants waive the right to file further briefs.

The Court: All right. Put it that way.

Mr. Dunlap: I don't think it makes any difference.

The Court: And that the Motion is accordingly denied.

Mr. Dunlap: I don't think it makes any difference but if you want to be precise about the record—

The Court: Let me say this now: That I'm going to enter your Decree, or the Government's Decree, one, see?

I'm going to enter a Decree here. I'm not just going
404 to enter an Order after this thirty days expires, saying that we'd better go on to trial.

Isn't that understood?

Mr. Dunlap: No, sir.

Mr. Stuckey: No, sir.

The Court: It isn't?

Mr. Dunlap: No, sir, because I think we clearly withheld that at the last hearing.

The Court: That may be so; that may be so.

Mr. Dunlap: That we said—

The Court: I don't have that transcript.

Mr. Dunlap: I believe I'm correct. I believe everyone understood. That was the last thing I said and I believe one of the first things we said, that we did not agree that we were foreclosed from a right to go to trial if you decided to enter the Government's Decree. That was the whole problem we had, and we don't think that that
405 would be proper, and I believe our Motion covers that point too.

I think that was clearly stated at the last hearing, Your Honor, and that you understood—I thought you did—that that was true.

Mr. Miller: Certainly, Your Honor, Derst Baking Company cannot be put in the position of consenting to the Court's action in the alternative of either granting the proposed Amended Decree as proposed by the defendants, or granting the Decree as sought by the Government.

The Court: I think frankly that Derst has a different standing here.

Well, all you are saying then is that you have presented a proposed Decree?

Mr. Dunlap: Yes, sir.

The Court: I have asked the Government to show cause why it should not be entered. If I'm satisfied that the Government has shown cause that it should not be entered, then I should then docket the case for trial?

406 Mr. Dunlap: I think that's correct.

Mr. Stuckey: That's the way I understand it.

The Court: That's the way you understood it?

Mr. Stuckey: Yes, sir.

The Court: In other words, I was in error when I suggested that I should go ahead and enter it, either the way you wanted it or the way they wanted it?

Mr. Stuckey: Well, I think—

The Court: I think that I was in my own mind—I've seen cases before where the parties agreed to dismissal and then couldn't agree on the—

Mr. Stuckey: Form of dismissal.

The Court: —the form of dismissal, the terms of the final Order. And I thought perhaps that's the way everybody understood it was being submitted, but if this
407 is the understanding that they have come in and said, "Here we are; we want to give him all he asks for," and you object and convince me that your objection is well taken, that these proceedings are just wiped out and the case is set for trial and that you go on to trial.

Mr. Stuckey: That's been my understanding all along.

The Court: All right.

Mr. Dunlap: I don't think counsel had any different throught from that.

The Court: All right. I'm glad I brought it up.

Mr. Stuckey: I might make this point, in defense of the defendants, that if you entered the Government's Decree it certainly wouldn't be any consent in quotations by the defendants.

The Court: Well, certainly they would have a right to appeal if I—they are not consenting to what you want. That's been their pleading.

408 Mr. Stuckey: Yes, sir.

Mr. Dunlap: I don't believe there is any motion before Your Honor to enter the Government's Decree.

The Court: I understand. I think that's clear.

I will get you, Hal, to get the Clerk to filemark this affidavit. I have marked it filed before me this day; and thirty days is Sunday, 14th of July. It will be July 15 anyway.

I'll be glad to hear from you before then.

Mr. Stuckey: All right, sir.

The Court: To get this thing done.

And thereupon the hearing was concluded.

409 (Reporter's Certificate to foregoing transcript omitted in printing.)

(File endorsement omitted)

410 IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

Civil No. 4735-Civ-J

UNITED STATES OF AMERICA, *Plaintiff*,

v.

WARD BAKING COMPANY, et al., *Defendants*.

Order Denying Defendants' Motion to Dismiss Count II of Complaint, etc.—June 22, 1962

This matter coming on to be heard on June 14, 1962 on the court's order to show cause dated May 8, 1962 and the Plaintiff, United States of America, having filed a written formal reply to the said order on or before June 1, 1962, along with an accompanying brief; and the Defendants on June 11, 1962 having filed a motion for leave to file an amended motion for entry of judgment, a copy of which amended motion was attached as Exhibit "A" to said motion for leave to file, and appended as exhibits to said amended motion was an amended proposed judgment as to Count II and an affidavit of H. M. Blackshear, Jr.; and at the said hearing H. M. Stuckey, attorney for the Plaintiff, United States of America, having tendered to the court for filing an affidavit of H. M. Stuckey and having moved to strike from the file the affidavit of H. M. Blackshear, Jr.; and the Defendants having tendered to the court for filing a brief in reply to the brief of the Plaintiff filed with the court on June 1, 1962; and the Defendants having stated to the court they did not desire to file a reply brief in support of their motion to dismiss Count II of the complaint and the parties having stated to the court that the Defendants' amended motion for entry of judgment could be considered by the court without further oral argument or hearing; and the court having heard the argument of counsel and having considered the same,

411 IT IS HEREBY ORDERED:

1. The Defendants' motion to dismiss Count II of the Plaintiff's complaint is hereby denied.

2. That the motion of Plaintiff's attorney to strike from the record and to remove from the file the affidavit of H. M. Blackshear, Jr. is hereby denied.

3. The Defendants' motion for leave to file an amended motion for entry of judgment is hereby granted and the same is hereby filed along with its accompanying exhibits.

4. That the affidavit of H. M. Stuckey tendered for filing by the Plaintiff's counsel is hereby received and filed.

5. That the brief of the Defendants tendered to the court for filing is hereby received and filed.

6. That if the Plaintiff desires to file a written reply and/or brief to the Defendants' amended motion for entry of judgment or to the brief of the Defendants filed herein, that the Plaintiff file such written reply and/or brief on or before July 15, 1962 or file with the court prior to that time a written statement that the Plaintiff does not desire to file any such written reply or brief.

DATED at Jacksonville, Florida, this June 22, 1962.

BRYAN SIMPSON
United States District Judge

(File endorsement omitted)

412 IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

(Title omitted)

Reply Brief and Statement of Government's Position Re Entry of Defendants' Second Proposed Judgment—Filed July 16, 1962

On May 8, 1962 the defendants in this case moved this Court for entry of a so-called consent judgment, to which the Government did not consent. On May 8, 1962, the Court entered an order directing the Government to show

cause why the defendants' motion should not be granted. On May 31, 1962, the Government filed a memorandum opposing the entry of the said judgment. On June 14, 1962, the defendants filed a memorandum in answer to the Government's opposition to the defendants' motion and at the same time the defendants filed an amended proposed judgment. The Court has given the Government this opportunity to reply to the defendants' memorandum, if it wished, and to state its position in regard to the defendants' proposed amended judgment, giving the Government until July 15, 1962, to do so.

The Government believs that if the Court were to enter the proposed judgment over the Government's objection, in the absence of any findings of fact, the Court having heard no evidence, the Court would be committing error. It is to prevent this from being done that the Government deems it desirable to reply briefly to the legal points raised in the defendants' memorandum in which they assert that the Court has a right to enter the judgment.

413

I

The Judgment Cannot Legally Be Entered

The defendants argue that the judgment which they propose "is a consent judgment" which, of course it is not. Nor does it "amount to" a consent judgment within the meaning of that term as used by Congress. A judgment imposed upon a party against his consent can never be deemed a consent judgment.* The defendants' analogy of a *nolo* plea in a criminal case and their contention that since the court can accept a *nolo* plea over the objection of the Government it can also accept a judgment over the Government's objection does not follow.

Nolo pleas are treated as guilty pleas for the purposes of the particular case and the defendant is given the same

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*"A consent decree, as the court views it, is an agreement between the contending parties in the case, such agreement meeting with the approval of the court. That of course, cannot be appealed from. Since the Government has not and will not consent to these decrees, they cannot properly be termed consent decrees, and the court cannot force a consent decree upon one of the parties. That indeed, would be an anomalous situation." *United States* v. *Hartford-Empire Company*, 1 F.R.D. 424, 426-427 (N.D. Ohio).

punishment on a *nolo* plea as he would be given on a guilty plea. *A defendant, on a plea of nolo, has nothing to say as to the punishment he receives.* A defendant in a civil case who enters into a consent judgment has much, in fact everything, to say as to the relief which is obtained against him. A consent judgment is a result of bargaining between the plaintiff and the defendant. A defendant cannot enter a *nolo* plea without first withdrawing his plea of not guilty. A defendant can enter into a consent judgment and at the same time leave on the record his denial of the charge.

II

The Proposed Judgment Does Not Give the Government All the Relief to Which It Could Be Entitled After A Successful Trial

The defendants argue that their proposed amended
414 judgment gives the Government all of the relief to which the Government would be entitled even after a successful trial.** But the parties cannot predict what relief the trial may demonstrate to be essential. And after trial the record may require additional relief not now contemplated.

When the defendant in the *Hartford-Empire case, supra* moved for the entry of a so-called consent decree containing the injunctive provisions to which it "believed" the Government was entitled, Judge Kloeb denied the motion peremptorily saying that he would not "prejudge" the case. Among other things the complaint had a general prayer for "such other relief as may be required and deemed proper." Judge Kloeb stated that he could not "anticipate what form of relief he would deem to be wise, expedient and necessary to be entered into a decree, if it be found that some or all of substantially all of the allegations of the complaint are sustained." (P. 429)

The defendants here argue that "If the Government had admissable (sic) evidence going beyond the facts plead showing a legal need for broader relief, then it should have set this out specifically in answer to the rule nisi." But

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** By implication, they took the same position in regard to the first proffered judgment which offered less relief than does the amended judgment.

the simple answer to this argument is that the Government was under no duty to reveal all of its evidence in answer to the rule nisi.

III

The Government Has the Right to Refuse to Consent to a Judgment Which It Deems Inadequate

The defendants contend that the Government has no discretion as to acceptance or refusal of the proffered judgment. This novel contention is based on the ground that since the defendants have offered what in their opinion is appropriate relief, the Government must be satis-
415 fied with it and cannot ask for more. In its complaint, the Government prayed for "such further, general, and different relief as the nature of the case may require *and the Court may deem appropriate* in the premises." The defendants have apparently misread this prayer as asking for such relief "as *the defendants* may deem appropriate."

Defendants also contend that "In acting on the defendants' motion, the Court should treat the pleaded facts as if proved and admitted." Apparently they mean that in acting on their motion, the Court should treat the facts pleaded by the Government as proved or admitted and by doing so the Court can grant the relief which *it* deems appropriate, which must perforce be the same as what the defendants deem appropriate.

If the defendants are willing to admit the charge, the Government would have to be satisfied with the relief which the Court would, on the basis of the pleadings, deem appropriate, subject to its right to appeal. If the defendants are sincere in their belief that the relief which they have offered is the same as the Court would deem to be appropriate, they have nothing to fear by admitting the charge. But they cannot continue to maintain their innocence and at the same time have a judgment of their own choosing entered. In short, they cannot both eat their cake and have it.

IV

Objections to Defendants' Proposed Amended Judgment

The Government insists on two provisions of relief to which the defendants have refused to accede. They are (1) a general injunction against conspiring to fix the price of bakery products to any third party other than the Government, and (2) an injunction against urging or suggesting to any seller of bakery products the quotation or charging of any price or other terms or conditions of sale of bakery products.

Surely this relief is not arbitrary on the basis of a complaint charging the defendants with having engaged in a price fixing conspiracy extending over at least a four year period.

416 In our May 31 memorandum we asked the question "Can it be said that the Government is unreasonable in being apprehensive that the defendants, having conspired to fix the price of bread and rolls to certain Governmental installations in a certain area, will not also attempt to fix the price of other bakery products to other Governmental installations in other areas?" In this connection we feel that the Court will find it not without significance that on June 27, 1962, a federal grand jury in Philadelphia indicted the defendant Ward Baking Company on a charge of conspiring with five other baking companies to fix the prices of "economy" bread sold in the Philadelphia-Trenton area.

We are not urging the Court to enter the judgment suggested by the Government, or attempting to argue here the merits of our judgment versus the merits of defendants' proposed judgment. We are voicing our objection to the entry of any proposed judgment without adjudication and without our consent.

Conclusion

It is respectfully submitted that the defendants' motion for entry of judgment against it should be denied.

Dated: July 13, 1962

Alfred Karsted
Attorney
Department of Justice

(File endorsement omitted)

418 IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

(Title omitted)

Order Granting Defendants' Motion for Entry of Judgment—December 10, 1962

This cause came on to be heard on June 14, 1962 on defendants' motion for entry of judgment and upon the plaintiff's opposition thereto. All parties were represented before the court. The situation confronting the court can be best understood by a review of the record and events in this case, and in the companion criminal antitrust action, Criminal Action No. 11677 Crim-J.

On March 6, 1961 an indictment was returned by the Grand Jury in this district, charging that Ward Baking Company, American Bakeries Company, Derst Baking Company, Flowers Baking Company, Inc. and Southern Bakeries Company had engaged in a combination and conspiracy in unreasonable restraint of trade and commerce in violation of Section 1 of the Sherman Act. The combination and conspiracy complained of consisted of an agreement among the defendants (1) to allocate among themselves the business of supplying bakery products to Federal Naval Installations in the Jacksonville area, which encompassed Northeast Florida and Southeastern Georgia, and (2) to submit non-competitive, collusive and rigged bids and price quotations for supplying bakery products to the Federal Naval Installations in the said Jacksonville area.

On April 10, 1961 the arraignment in the criminal action took place. All of the defendants asked leave to interpose pleas of nolo contendere. After argument be-
419 fore the court, the court granted such leave, accepted the defendants' pleas of nolo contendere, and imposed substantial fines on each defendant.

Thereafter, on July 21, 1961 the United States of America filed a civil complaint against the same defendants based upon the same facts as were presented in the companion criminal antitrust action No. 11677-J. In Count One of the complaint so filed in this cause, the plaintiff charged the defendants with violations of the False Claims

Act (31 U.S.C. Sects. 231-233) and requested forfeitures and double the amount of damages suffered by the plaintiff due to defendants' acts.

In Count Two of the civil complaint, the plaintiff alleged violation of Section 1 of the Sherman Act, charging the defendants with allocating among themselves the business of supplying bakery products to the United States Naval Installation in the Jacksonville area and with submitting non-competitive, collusive and rigged bids and price quotations for supplying bakery products to the United States Naval Installations in that area.

The plaintiff then asked the defendants be enjoined from

(1) Allocating among themselves the business of supplying bakery products (meaning bread and rolls) to the United States Naval Installations in the Jacksonville area, defined as the Northern part of the State of Florida and the Southeastern part of the State of Georgia, and from

(2) Submitting non-competitive, collusive and rigged bids and price quotations for supplying bakery products to the United States Naval Installations in the Jacksonville area.

The plaintiff also asked for such further, general and different relief as the nature of the case may require and the court may deem appropriate in the premises.

During the months of March and April of 1962, the defendants negotiated with the plaintiff in an effort to dispose of this civil action, on the basis of the payment of moneys sought in Count One and a consent decree as to Count Two. The parties were able to agree on a monetary settlement of Count One, but were unable to agree to a form of proposed judgment to settle Count Two.

420

On May 8, 1962 a hearing was held by the court on all remaining issues in the case. Count One was settled by the payment by the defendants of the sum of $44,000. At the same time the defendants filed with the court a motion for entry of judgment, attaching to said motion a proposed form of Judgment on Count Two which, if entered, would grant the specific relief against the defendants which had been requested by plaintiff in paragraph (b) of its prayer for relief. The plaintiff's attorney also tendered to the

court a proposed form of judgment on Count Two. At the conclusion of this hearing the court issued an order to show cause why defendants' motion for entry of a judgment on Count Two should not be granted and why the proposed judgment tendered therewith should not be entered. The plaintiff did not, in response to the order to show cause, file or attempt to file any amendments to the complaint relating to the facts upon which the injunctive relief was prayed for or to broaden the scope of the injunctive relief requested.

Prior to the hearing on said order to show cause, the defendants filed an amended motion for entry of judgment, which substantially expanded the scope of the judgment as originally proposed by them, and affidavits were filed by the parties. The amended proposed judgment enlarged the scope of the injunctive relief to cover sales of all types of bakery products and to expand the area of sales from sales to Naval Installations in the Jacksonville area to sales to the United States of America and its agencies or instrumentalities wherever located.

The proposed judgments as ultimately tendered to the court by the plaintiff and defendants were alike except in the following respects:

(1) The judgment proposed by defendants applied to the sale of bakery products to the United States of America, its agencies or instrumentalities. That proposed by the plaintiff applied to the sale of bakery products to third persons and was not limited to sales to the United States of America, its agencies and instrumentalities.

421 (2) The judgment propsed by the plaintiff enjoined the defendants from urging or requiring any seller of bakery products to adhere to any particular price or other terms or condition of sale for bakery products.

The court notes that the injunctive aspects of the judgment proposed by the defendants are much broader than the relief specifically requested by the plaintiff in its complaint as to the type of products involved, the geographical area covered, and the classes of customers who would be affected. The complaint as filed concerned only sales of bread and rolls to Naval Installations in the restricted Jacksonville area.

The demand of the plaintiff as to the inclusion of the two controversial provisions in its tendered judgment does not have a reasonable basis under the circumstances here present. The insistence of the plaintiff on the inclusion thereof constitutes arbitrary and unauthorized conduct in view of the intent of Congress to encourage consent decrees pursuant to Section 5 of the Clayton Act and thus avoid a costly and protracted trial for the parties. See *Twin Ports Oil Co.* v. *Pure Oil Co., et al.*, (D.C.Minn. 1939), 26 F. Supp. 366; *U. S.* v. *Brunswick-Balke-Collender Co.*, (D.C.Wisc. 1962), 203 F. Supp. 657.

On this record the form of the proposed judgment tendered by the defendants appears to provide the plaintiff with every safeguard needful to accomplish the prevention and restraint of the violations of the Sherman Act as set forth in the complaint and grants a restraint much broader than the relief prayed for by the plaintiff. Based upon this court's knowledge of the facts involved in Case No. 11677-Crim-J and this record, the proposed judgment which the court is entering provides all the relief to which the plaintiff would be entitled after the entry of a decree pro confesso against each defendant and after a trial on the allegations of this complaint.

It appears to the court that the Department of Justice, by withholding its consent to the proffered judgment, is frustrating the clear intent of Congress to encourage early entries of injunctional decrees without long and protracted trials, and that the government is attempting to
422 place the defendants in the position of either capitulating to an arbitrary and unauthorized demand, or undergoing the ordeal of a long and costly trial.

The mere fact that a court has found a defendant has committed an act in violation of a statute does not justify an injunction broadly to obey the statute and thus subject the defendant to contempt proceedings if he shall at any time in the future commit some new violation unlike and unrelated to that with which he was originally charged. *N.L.R.B.* v. *Express Publishing Co.* 1944, 313 U.S. 246, 435-436, 61 S. Ct. 693, 699, 85 L. Ed. 930.

This court sitting as a court of equity has power to afford the defendants relief. *U. S.* v. *Brunswick-Balke-Collender Co.* (E.D. Wisc. 1962), 203 F. Supp. 657.

The amended motion of the defendants, Ward Baking Company, American Bakeries Company, Derst Baking Company, Flowers Baking Company, Inc. and Southern Bakeries Company for entry of judgment is hereby granted.

DATED at Jacksonville, Florida this 10 day of December, 1962.

BRYAN SIMPSON
Chief Judge

(File endorsement omitted)

423 IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

Civil No. 4735-Civ-J

UNITED STATES OF AMERICA, *Plaintiff*,

v.

WARD BAKING COMPANY, AMERICAN BAKERIES COMPANY, DERST BAKING COMPANY, FLOWERS BAKING COMPANY, INC. and SOUTHERN BAKERIES COMPANY, *Defendants*.

Final Judgment—Count II—December 10, 1962

Plaintiff, United States of America, having filed its complaint herein in two Counts on July 21, 1961 and final judgment having been entered on Count I of the complaint and the defendants, by their respective attorneys, having filed a Motion for Entry of a Judgement along with amendments in conformity thereto with the relief sought by the plaintiff in its complaint, without trial or adjudication of any of the issues of fact or law herein and before the taking of any testimony; it is hereby

ORDERED, ADJUDGED AND DECREED upon Count II of the complaint as follows:

I.

This Court has jurisdiction of the subject matter hereof and of the parties consenting thereto and Count II of the complaint states a claim upon which relief may be granted

against the defendants under Section 1 of the Act of Congress of July 2, 1890, entitled, "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies" commonly known as the Sherman Act, as amended.

424

II.

The provisions of this final judgment applicable to any defendant shall apply also to each of its subsidiaries, successors, assigns, officers, directors, agents and employees, and to all other persons in active concert or participation with such defendant who shall have received actual notice of this final judgment by personal service or otherwise.

III.

Each of the defendants is enjoined and restrained from directly or indirectly entering into, adhering to, or claiming or maintaining any right under any contract, agreement, arrangement, understanding, plan or program with any other person to:

(a) Submit noncompetitive, collusive or rigged bids, or quotations for supplying any bakery products to United States of America, its agencies or instrumentalities, or

(b) Allocate, divide or rotate the business of supplying any bakery products to United States of America, its agencies or instrumentalities.

IV.

Each defendant is enjoined and restrained from directly or indirectly disclosing to or exchanging with any seller of bakery products the intention to submit or not submit a bid or quotation for supplying bakery products to United States of America, its agencies or instrumentalities, the fact that such a bid or quotation has or has not been submitted or made, or the content or terms of any such bid or quotations.

V.

Each defendant is ordered and directed for a period of five years after the date of entry of this final judgment,

to submit a sworn statement in the form set forth in the Appendix hereto with each bid for bakery products submitted to any governmental agency of the United
425 States of America (unless such installation requires the submission of a different type of sworn statement to the same effect), such sworn statement to be signed by the person actually responsible for the preparation of said bid.

VI.

For the purpose of securing compliance with this final judgment duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to any defendant made to its principal office, be permitted, subject to any legally recognized privilege and with the right of said defendant to have counsel present:

(a) Reasonable access during the office hours of said defendant, to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of said defendant, relating to the supplying of bakery products to the United States of America, its agencies and instrumentalities; and

(b) Subject to the reasonable convenience of said defendant, and without restraint or interference, to interview officers and employees of said defendant, who may have counsel present, regarding such matters contained in this final judgment.

Upon such written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, the said defendant shall submit such written reports with respect to supplying bakery products to any governmental agency of the United States of America.

No information obtained by the means permitted in this Section shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the plaintiff except in the course of legal proceedings for the purpose of securing compliance with this final judgment

in which the United States is a party or as otherwise required by law.

426 VII.

Jurisdiction is retained for the purpose of enabling any of the parties to this final judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this final judgment, for the modification or termination of any of the provisions thereof, for the enforcement of compliance therewith, and punishment of violations thereof.

Dated at Jacksonville, Florida this 10 day of December, 1962.

Bryan Simpson
United States District Judge

427 APPENDIX

Affidavit

The undersigned hereby certifies to his best knowledge and belief that:

(1) The bid to .....
(name of recipient of bid) dated .....
has not been prepared by .....
(name of defendant) in collusion with any other seller of bakery products, and

(2) The prices, terms or conditions of said bid have not been communicated by the undersigned nor by any employee or agent of .....
(name of defendant), to any other seller of bakery products and will not be communicated to any such seller prior to the official opening of said bid,

in violation of the Final Judgment in Civil No. 4735-Civ.-J entered by the United States District Court for the Southern District of Florida, Jacksonville Division, on ....., 1962.

Dated: ....., 1962

(File endorsement omitted)

428 IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

Notice of Appeal to the Supreme Court of the United States—Filed February 4, 1963

I

Notice is hereby given that the plaintiff, United States of America, hereby appeals to the Supreme Court of the United States from the order and judgment entered in this action on December 10, 1962. This appeal is taken pursuant to 15 U.S.C. 29.

II

The Clerk will prepare a certified transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States, and include therein the entire record before the district court including the pleadings, transcripts of argument, and this Notice of Appeal.

III

The government's complaint charged the defendants, *inter alia*, with rigging bids and allocating business in violation of Section 1 of the Sherman Act, and sought an adjudication of the violation, an injunction against the alleged unlawful practices and "such further, general and different relief as the nature of the case may require and the Court may deem appropriate". After consent decree negotiations had reached an impasse, the defendants requested the court to enter an injunction which was narrower than the injunction proposed by the government, in that it did not contain two provisions upon which the government insisted. Before any evidence was heard, and over the government's objection, the Court entered the narrower decree tendered by the defendants.

429 The question presented by this appeal is whether the district court erred in entering the final judgment proposed by the defendants, without the government's

consent and without a trial of the issues presented by the complaint.

/s/ WILLIAM P. CASSEDY
Attorney for the Plaintiff

Dated: February 1, 1963

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430 CERTIFICATE OF SERVICE

(omitted in printing)

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431 CLERK'S CERTIFICATE

(omitted in printing)

 SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 993

UNITED STATES OF AMERICA, *Appellant*,

v.

WARD BAKING CO., ET AL., *Appellees*.

Stipulation for Supplemental Record—Filed April 24, 1963

It is hereby stipulated and agreed by and between the attorneys for the respective parties that the following papers and documents shall be certified and transmitted by the Clerk of the United States District Court for the Middle District of Florida to the United States Supreme Court as a supplemental record herein:

1. Notice of preliminary pretrial conference on March 22, 1962 at 10:00 A.M., filed on February 8, 1962.

2. Notice of hearing on remaining issues before Honorable Bryan Simpson on May 8, 1962, filed on April 25, 1962.

3. Form of proposed final judgment tendered and filed by the government before Judge Simpson at the hearing on May 8, 1962.

/s/ ARCHIBALD COX
Archibald Cox
Solicitor General

April 24, 1963

433 AMERICAN BAKERIES COMPANY

By /s/ CHARLES L. GOWEN
Charles L. Gowen
King & Spalding

DERST BAKING COMPANY

By /s/ JOHN B. MILLER
John B. Miller
Hitch, Miller, Beckmann & Simpson

SOUTHERN BAKERIES COMPANY

By /s/ JOHN H. BOMAN, JR.
John H. Boman, Jr.
Hansell, Post, Gardner, Brandon & Dorsey

WARD BAKING COMPANY and FLOWERS BAKING COMPANY, INC.

By /s/ FRED H. KENT
Fred H. Kent

By /s/ JOHN W. BALL
John W. Ball

By /s/ DAVISSON F. DUNLAP
Davisson F. Dunlap

All members of the firm of Ulmer, Murchison, Kent, Ashby & Ball

(File endorsement omitted)

434 IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

No. 4735 Civ-J

UNITED STATES OF AMERICA, *Plaintiff*,

v.

WARD BAKING COMPANY, AMERICAN BAKERIES COMPANY, DERST BAKING COMPANY, FLOWERS BAKING COMPANY, INC. and SOUTHERN BAKERIES COMPANY, *Defendants*.

Notice of Pre-Trial Conference—Filed Feb. 8, 1962

TO—

United States Attorney,

John B. Miller, Esq., and Messrs, Hitch, Miller & Beckmann, P. O. Box 2126, Savannah, Georgia

John W. Ball, Esquire and Davisson F. Dunlap, Esquire, Florida National Bank Building, Jacksonville, Florida.

Fred H. Kent, Esquire, Davisson F. Dunlap, Esquire, and John Ball, Esquire, Florida National Bank Building, Jacksonville, Florida

W. H. Blackshear, Jr., and Messrs. Spalding, Sibley, Troutman Meadow & Smith, 434 Trust Company of Georgia Bldg., Atlanta, Georgia

Messrs. Hitch, Miller & Beckman, P. O. Box 2126, Savannah, Ga.

Messrs. Adair, Ulmer, Murchison, Kent & Ashby, Florida National Bank, Jacksonville, Florida

John H. Boman, Jr., Esquire, and Messrs, Crenshaw, Hansell Ware, Brandon & Dorsey, 310 Multon Federal Building

NOTICE that the above entitled case has been set for hearing and disposition of all pending matters and preliminary pretrial conference on March 22, 1962 at 10:00 A.M. with a view to narrowing of issues, limitation of discovery, and

other pertinent matters. Counsel should attend this hearing prepared to discuss date for final pretrial hearing and for date of trial.

BRYAN SIMPSON
Chief Judge

February 8, 1962

Clerk's Certificate to foregoing paper omitted in printing.

(File endorsement omitted)

435 IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

No. 4735-Civil-J

UNITED STATES OF AMERICA, *Plaintiff*,

v.

WARD BAKING COMPANY, AMERICAN BAKERIES COMPANY, DERST BAKING COMPANY, FLOWERS BAKING COMPANY, INC. and SOUTHERN BAKERIES COMPANY, *Defendants*.

Nunc Pro Tunc Order—April 18, 1963

At the hearing before this Court on May 8, 1962, which resulted in the entry of this Court's order to show cause dated May 8, 1962, as said order to show cause recites, the attorney for the plaintiff, tendered to the Court a proposed form of final judgment on count two of said complaint. Said proposed form of final judgment was not marked filed by the Court, nor by the Clerk, nor made the subject of a minute or docket entry, but was lodged in an auxiliary file in this cause entitled by the Clerk "Volume #3 Briefs & Transcript." Said form of proposed final judgment has been removed from said auxiliary file, marked Exhibit A to this order, and attached to this order by the undersigned Judge.

The form of consent judgment as to count two of the complaint proposed by the defendants at said hearing of May 8, 1962 is a part of this record as an attachment to the defendants' motion for entry of consent judgment.

(filed May 8, 1962). Both proposed forms of judg-
436 ment, that is the form proposed by the plaintiff as well as the form proposed by the defendants, should properly be a part of the record of said hearing of May 8, 1962. In consideration whereof, it is

ORDERED that the attached blank form of final judgment, Exhibit A hereto, is ordered filed and docketed by the Clerk of this Court, nunc pro tunc as of May 8, 1962.

DONE AND ORDERED in Chambers, at Jacksonville, this 19th day of April, 1963.

/s/ BRYAN SIMPSON
Chief Judge

U. S. Attorney, Jacksonville, Florida

Honorable Lee Loevinger
Assistant Attorney General
Antitrust Division
Department of Justice
Washington 25, D. C.

Lionel Kestenbaum, Esquire
Assistant Chief Appellate Section
Antitrust Division
Department of Justice
Washington 25, D. C.

Davisson F. Dunlap, Esquire
850 Florida National Bank Building
Jacksonville 2, Florida

Counsel of record for defendant Ward Baking Company for disposition to counsel of record for other defendants.

Clerk's Certificate to foregoing paper omitted in printing.

Exhibit A (Order of April 18, 1963)

437 IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

Civil No. 4735-Civ.-J

UNITED STATES OF AMERICA, *Plaintiff*,

v.

WARD BAKING COMPANY, AMERICAN BAKERIES COMPANY, DERST BAKING COMPANY, FLOWERS BAKING COMPANY, INC. and SOUTHERN BAKERIES COMPANY, *Defendants*.

FINAL JUDGMENT

Plaintiff, United States of America, having filed its complaint herein on July 21, 1961, and the plaintiff and the defendants by their respective attorneys having severally consented to the entry of this Final Judgment, without trial or adjudication of any issue of fact or law herein;

NOW, THEREFORE, before the taking of any testimony and the defendant Derst Baking Company having heretofore been dismissed as a defendant under Count I of the complaint herein, and plaintiff and the remaining defendants having jointly moved to dismiss Count I, it is hereby

ORDERED, ADJUDGED AND DECREED as follows:

I

Count I of the complaint is hereby dismissed with prejudice.

II

This Court has jurisdiction of the subject matter hereof and of the parties consenting hereto, and the complaint states a claim under Count II which relief may be granted against the defendants under Section 1 of the Act of Con-
gress of July 2, 1890, entitled "An Act to protect
438 trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended.

III

The provisions of this Final Judgment applicable to any defendant shall apply also to each of its subsidiaries, successors, assigns, officers, directors, agents and employees, and to all other persons in active concert or participation with such defendant who shall have received actual notice of this Final Judgment by personal service or otherwise.

IV

Each of the defendants is enjoined and restrained from directly or indirectly entering into, adhering to, or claiming or maintaining any right under any contract, agreement, arrangement, understanding, plan or program with any other person to:

(A) Establish, maintain, stabilize or fix prices or other terms or condition for sale of any bakery products to any third person;

(B) Submit noncompetitive, collusive or rigged bids, or quotations for the sale of bakery products; or

(C) Allocate, divide or rotate customers for the sale of bakery products.

V

Each defendant is enjoined and restrained from directly or indirectly:

(A) Urging or requiring any seller of bakery products to adhere to any particular price or other term or condition of sale for bakery products; or

(B) Disclosing to or exchanging with any seller of bakery products the intention to submit or not submit a bid or quotation, the fact that a bid or quotation has or has not been submitted or made, or the content or terms of any bid or quotation.

439

VI

Each defendant is ordered and directed for five (5) years from the date of entry of this Final Judgment to submit a sworn statement in the form set forth in the

Appendix hereto with each bid for bakery products submitted to any governmental agency (unless such agency requires the submission of a different type of sworn statement to the same effect), such sworn statement to be signed by the person actually responsible for the preparation of said bid, and the person supervising such person, such as the plant manager.

VII

For the purpose of securing compliance with this Final Judgment duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to any defendant made to its principal office, be permitted, subject to any legally recognized privilege and with the right of said defendant to have counsel present:

(A) Reasonable access during the office hours of said defendant, to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of said defendant, relating to any of the matters contained in this Final Judgment; and

(B) Subject to the reasonable convenience of said defendant, and without restraint or interference, to interview officers and employees of said defendant, who may have counsel present, regarding such matters.

Upon such written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, he said defendant shall submit such written reports with respect to any of the matters contained in
440 this Final Judgment as from time to time may be necessary for the purpose of enforcement of this Final Judgment.

No information obtained by the means permitted in this Section shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the plaintiff except in the course of legal proceedings for the purpose of securing compliance with this Final Judgment in which the United States is a party or as otherwise required by law.

VIII

Jurisdiction is retained for the purpose of enabling any of the parties consenting to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification or termination of any of the provisions thereof, for the enforcement of compliance therewith, and punishment of violations thereof.

Dated: ....., 1962

.....

United States District Judge

441

APPENDIX

Affidavit

The undersigned hereby certify to their best knowledge and belief that:

(1) The bid to ..... (name of recipient of bid) dated ..... has not been prepared by ..... (name of defendant) in collusion with any other seller of bakery products, and

(2) The prices, terms or conditions of said bid have not been communicated by the undersigned nor by any employee or agent of ..... (name of defendant), to any other seller of bakery products and will not be communicated to any such seller prior to the official opening of said bid,

in violation of the Final Judgment in Civil No. 4735-Civ.-J entered by the United States District Court for the Southern District of Florida, Jacksonville Division, on ....., 1962.

Dated: .....

.....

Signature of person responsible for the preparation of the bid

.....

Signature of person supervising the above person.

No. 993, October Term, 1962

UNITED STATES, *Appellant*,

v.

WARD BAKING CO., ET AL.

APPEAL from the United States District Court for the Middle District of Florida.

Order Noting Probable Jurisdiction—June 10, 1963

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is placed on the summary calendar.

☆ U. S. GOVERNMENT PRINTING OFFICE 1963—695057/P.O. 70

INDEX

CITATIONS

Cases:

681416—63——1

In the Supreme Court of the United States

OCTOBER TERM, 1962

No.

UNITED STATES OF AMERICA, APPELLANT

v.

WARD BAKING CO., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the district court (Appendix A, *infra*, pp. 16–21) is not yet reported.

JURISDICTION

The count of the complaint involved in this appeal was filed under Section 4 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 4, to prevent and restrain violations of Section 1 of that Act. The judgment of the district court (Appendix B, *infra*, pp. 22–26) was entered on December 10, 1962, and the notice of appeal was filed on February 4, 1963. The jurisdiction of this Court is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, as

amended, 62 Stat. 969, 15 U.S.C. 29. *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593; *Hughes* v. *United States*, 342 U.S. 353; *United States* v. *Parke, Davis & Co.*, 365 U.S. 125.

STATUTES INVOLVED

The Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1, *et seq.*, provides in pertinent part:

> Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. * * *
>
> * * * * * *
>
> Sec. 4. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. * * *

The Clayton Act, Section 5(a), 38 Stat. 731, 15 U.S.C. 16, provides as follows:

> Sec. 5. (a) A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such

defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 4A, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under section 4A.

QUESTION PRESENTED

After consent decree negotiations in a civil antitrust suit had reached an impasse, the appellees requested the district court to enter an injunction which was narrower than that sought by the government. The question presented is whether the district court erred in entering the judgment proposed by the appellees, without the government's consent and without trial of the issues presented by the complaint.

STATEMENT

On July 21, 1961, the United States filed a complaint in two counts charging five bakery companies (the appellees) with combining and conspiring to allocate among themselves the business of supplying bakery products (defined as bread and rolls) to federal naval installations in the Jacksonville, Florida area, and to submit non-competitive and rigged bids and price quotations on such business. Count I charged that such conduct violated the False Claims Act (31 U.S.C. 231–233), and sought forfeitures and double damages as provided in that Act. Count II charged that the conduct violated Section 1 of the

Sherman Act, and sought the following relief: (1) an adjudication that defendants had violated that Act; (2) an injunction prohibiting defendants from allocating among themselves the business of supplying bakery products to federal naval installations in the Jacksonville area and submitting rigged bids for such business; (3) "such further, general, and different relief as the nature of the case may require and the Court may deem appropriate * * *."[1]

As a result of settlement negotiations, the parties agreed to dispose of Count I by the appellees' payment of $44,000.

The parties were unable to agree upon the terms of a consent decree to settle the Sherman Act count. At a pre-trial conference on May 8, 1962, the appellees submitted a "Motion for Entry of a Consent Judgment" together with a proposed judgment to which the government had not consented. The motion stated that the judgment was "framed in the language used by the Plaintiff in its prayer for relief"

[1] Prior to the filing of the complaint, an indictment had been returned in that court (Case No. 11677-Crim-J) charging the same defendants with violating Section 1 of the Sherman Act by committing substantially the same acts as were charged in Count II of the complaint. Over the government's objection, the district court accepted from all of the defendants pleas of *nolo contendere* to this indictment and to a second indictment (Case No. 11676-Crim-J) charging four of the five defendants with conspiring to fix the price of bread and rolls on sales to "wholesale accounts," defined as "grocery stores, supermarkets, restaurants, hotels, and similar large purchasers * * *."

In opposing acceptance of the *nolo* pleas, government counsel briefly discussed the facts involved in the cases, but did not present in any detail the evidence which would have been introduced at trial.

and purported to provide "every safeguard" needed to prevent and restrain the alleged violations (Motion, pp. 3-4). The proposed judgment enjoined each of the appellees from agreeing to submit "noncompetitive, collusive or rigged bids, or quotations for supplying bakery products to United States Naval installations in the Jacksonville area," or to "[a]llocate, divide or rotate the business of supplying bakery products to United States Naval installations in the Jacksonville area"; and from "disclosing to or exchanging with any seller of bakery products" its intent to submit or not submit a bid, or the terms of any such bid for supplying bakery products to naval installations in the Jacksonville area. The proposed judgment also required each appellee to submit a sworn statement of non-collusion with every bid for bakery products submitted to any naval installations in the Jacksonville area for three years after entry of the judgment.

After an oral hearing, the court ordered the government to show cause why the proposed judgment should not be entered. The government filed objections. The appellees then submitted an amended judgment which made three changes in their original proposal: (1) its scope was broadened to cover all bakery products, not only bread and rolls; (2) the prohibition against allocating business and rigging bids on sales to naval installations in the Jacksonville area was extended to all sales to the United States, its agencies or instrumentalities; (3) the period during which the appellees were required to submit sworn statements of non-collusion was increased from three to five years.

The government objected to entry of the amended judgment submitted by defendants. It contended that the defendants' proposed judgment was still inadequate because (1) the prohibition against conspiring to fix prices of bakery products covered only sales to the federal government; and (2) there was no injunction against the appellees "urging or suggesting to any seller of bakery products the quotation or charging of any price or other terms or conditions of sale of bakery products."[2] In these circumstances, the government urged that the court could not terminate the case by entry of judgment without either the government's consent or a trial of the merits.

The district court entered appellees' proposed amended judgment, which recited that it was entered "without trial or adjudication of any of the issues of fact or law herein and before the taking of any testimony" (App. B, *infra*, p. 22). The court held that "[b]ased upon this court's knowledge of the facts involved in Case No. 11677–Crim–J [see n. 1, *supra*] and this record, the proposed judgment which the court is entering provides all the relief to which the plaintiff would be entitled after the entry of a decree pro confesso against each defendant and after a trial on the allegations of this complaint"; and that the judgment "appears to provide the plaintiff with every safeguard needful to accomplish the prevention and restraint of the violations of the Sherman Act as set

[2] The government agreed to a modification of this proposed provision to permit the appellees to print the suggested retail price of their products on the package (Affidavit of H. M. Blackshear, Jr., p. 4, attached to Amended Motion for Entry of Judgment, dated June 6, 1962.)

forth in the complaint * * *" (App. A, *infra*, p. 20). The court stated (*ibid.*) that the government's "demand [for] * * * the two controversial provisions * * * does not have a reasonable basis under the circumstances here present" and constituted "arbitrary and unauthorized conduct in view of the intent of Congress to encourage consent decrees pursuant to Section 5 of the Clayton Act * * *."

THE QUESTION IS SUBSTANTIAL

This appeal presents a substantial question in the administration of the antitrust laws as to the authority of a district court to terminate a government civil antitrust suit without a trial by entering a judgment providing narrower relief than that upon which the government is willing to settle the case through a consent judgment.

1. The district court had no basis for denying the government the full relief requested. The court could not possibly determine, without the benefit of the evidence developed at a trial, the exact character of the relief to which the government would be entitled. The pleadings and arguments on motions, even when taken together with the arguments on accepting pleas of *nolo contendere* in a companion criminal case (see n. 1, *supra*), furnish no foundation for concluding that the judgment proposed by the appellees gave the government "all the relief to which [it] would be entitled" after a successful trial on the merits.

In antitrust litigation "[a] full exploration of facts is usually necessary in order properly to draw * * *

a decree" (*Associated Press* v. *United States*, 326 U.S. 1, 22). Such cases customarily involve the presentation of detailed and extensive evidence covering the basic competitive practices in the industry, the history, development and scope of the violations, the extent and manner of the participation by the various individuals involved, and the probable development of the industry. A district court in antitrust litigation has a "wide range of discretion * * * to mould the decree to the exigencies of the particular case" (*United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 185; see *International Salt Co.* v. *United States*, 332 U.S. 392, 400–401). But the very breadth of such discretion necessarily requires the court to have before it all the facts bearing on the scope of appropriate relief before it determines what "action by the conspirators * * * will, so far as practicable, cure the ill effects of the illegal conduct, and assure the public freedom from its continuance" (*United States* v. *United States Gypsum Co.*, 340 U.S. 76, 88).

In the *Gypsum* case this Court explicitly recognized the principle "that relief, to be effective, must go beyond the narrow limits of the proven violation" (340 U.S. at 90). In implementing this principle, the Court ordered the scope of the decree in that case extended "to include all interstate commerce" although the "complaint of Sherman Act violation was restricted to the eastern territory of the United States" (*ibid.*). It also pointed out that in resolving doubts as to appropriate antitrust relief "courts should give weight to the fact of conviction as well as the circumstances under which the illegal acts occur" (*id.*,

p. 89). The basic error of the court below was not in refusing to broaden the relief but in refusing to hear the evidence required for an informed judgment as to how broad the relief should be.

These are not empty generalities. The proper scope of an equity decree intended to prevent future wrongdoing necessarily depends upon the extent of the wrongdoing, its duration and intensity, upon whether it was an isolated infraction or part of a larger scheme, upon whether it was company-policy formulated or approved by the highest executives or independent misconduct of subordinates. In the present case, the government's right to an injunction against allocating business and fixing prices on sales to non-government customers, and against urging or suggesting resale prices, would depend upon detailed evidence of the nature and extent of the combination and conspiracy. If, for example, it appeared that high-level management of the appellees had authorized or participated in the conspiracy to restrain trade in dealing with the government in the Jacksonville area, the additional provisions sought by the government might well turn out to be necessary to assure the public freedom from the continuance of similar illegal conduct in other markets under the supervision of that management. Cf. *United States* v. *United States Gypsum Co.*, 340 U.S. at 88. "It is a salutary principle that when one has been found to have committed acts in violation of a law he may be restrained from committing other related unlawful acts" (*National Labor Relations Board* v. *Express Pub. Co.*, 312 U.S. 426, 436).

Of course, after a trial the district court might have concluded that the facts developed showed no need for relief any broader than that proposed by the appellees. *United States* v. *Hartford-Empire Co.*, 1 F.R.D. 424, 427 (N.D. Ohio). The government, however, could then have appealed that ruling to this Court, which would then "examine the decree *in light of the record* to see that the relief it affords is adequate to prevent the recurrence of the illegality which brought on the given litigation" (*United States* v. *Loew's Inc.*, 371 U.S. 38, 52 (emphasis added)).

All the facts bearing upon the proper scope of relief in an antitrust case cannot be presented adequately in the pleadings and statements of counsel or at pretrial conferences. Inferences concerning the responsibility and intent of corporate executives, like appraisal of the virulence of a conspiracy, depend upon seeing and hearing the witnesses. The government is not entitled to a trial in order to conduct a fishing expedition, but having clear and concrete evidence of a conspiracy to fix prices upon some sales of bread, it cannot be required to abandon its request for an injunction against future related violations until the full details and extent of the conspiracy have been developed by discovery and trial.

The impossibility of determining what relief was appropriate without knowing all the facts, led the court in *United States* v. *Hartford-Empire Co., supra,* to reject a similar attempt by the defendants to have the court terminate an antitrust case by entering "consent" judgments to which the government had not consented. There, the court pointed out (p. 429):

> * * * The court does not now know and cannot pre-judge what the testimony in this case will disclose; therefore, he cannot anticipate what form of relief he would deem to be wise, expedient, and necessary to be entered into a decree, if it be found that some or all or substantially all of the allegations of the complaint are sustained. Hence the court cannot now say that the proposed decree would satisfy everything requested in the prayer. * * *
>
> * * * Until the record contains facts upon which conclusions may be based, the court feels that he would do wrong and commit error to anticipate facts and approve one or all of the proposed decrees at this time.

The court also noted (p. 427) that even assuming that the injunctive provisions proposed in one of the decrees "would be all that might be deemed necessary after the facts have been submitted, is the court actually now in a position to so determine and pre-judge? * * * I am of the opinion that an impossible situation would be reached by sustaining and signing such a proposed decree in anticipation of what the facts may be."

The same considerations also negate the district court's conclusion (App. A, *infra*, p. 20) that the government's insistence upon these two provisions "does not have a reasonable basis under the circumstances here present." There may be cases in which it is possible to say that it would be an error of law to grant the relief requested by the government upon any con-

ceivable set of facts that could be developed under the complaint. But obviously this is not such a case. Here, clearly, the determination of whether there is a reasonable basis for the relief sought by the government cannot be made until after there has been a full exploration of all the facts as to the alleged violations of law and the inferences to be drawn from them.

2. The district court improperly attempted to substitute its judgment for the discretion vested by law in the Attorney General when it ruled that the government's insistence upon the provisions as a condition of settling the Sherman Act count was "arbitrary and unauthorized conduct in view of the intent of Congress to encourage consent decrees pursuant to Section 5 of the Clayton Act and thus avoid a costly and protracted trial for the parties" (App. A, *infra*, p. 20). The main purpose of Section 5 was to aid treble-damage *plaintiffs* by making "a final judgment or decree" in a government antitrust suit "that a defendant has violated said laws * * * prima facie evidence against such defendant" in a subsequent treble-damage action (15 U.S.C. 16; see 51 Cong. Rec. 13851). The proviso excepting "consent judgments or decrees entered before any testimony has been taken * * *" (S. Doc. 584, 63rd Cong., 2d Sess., p. 6; 51 Cong. Rec. 15638, 15825) was inserted to save the government needless litigation expense by encouraging defendants to enter into consent decrees before trial (51 Cong. Rec. 16276). There is nothing in the language, legislative history or basic policy of Section 5 which in any way suggests that it was intended to limit the Attorney General's broad discretion to decide upon

what terms it would be in the public interest to settle an antitrust case rather than proceed to trial.

In *Swift & Co.* v. *United States*, 276 U.S. 311, this Court, in rejecting the contention that an antitrust consent decree was void "because the Attorney General had no power to agree" to a judgment which prohibited the defendants from doing acts which themselves were not illegal, stated (pp. 331–332): "[W]e do not find in the statutes defining the powers and duties of the Attorney General any such limitation on the exercise of his discretion as this contention involves. His authority to make determinations includes the power to make erroneous decisions as well as correct ones." The discretion of the Attorney General, as the government's chief law officer, to refuse to settle a particular case, except upon the terms he chooses, is no less than his discretion to agree to particular terms in a consent judgment, which was upheld in *Swift*. It is not for a district court to consider whether the Attorney General has made an "erroneous decision" in insisting upon certain terms of settlement; it cannot substitute its discretion for that of the Attorney General as to the appropriate basis for settlement. Even in such a case, the court has no alternative but to reject the defendant's proposed "consent" judgment and let the case go to trial.

3. The question plainly is important in the administration of the antitrust laws. More than 75 percent of civil antitrust suits brought by the government are now being terminated by consent judgments.[1] In the

[1] Subcommittee No. 5, House Committee on the Judiciary, 86th Cong., 1st Sess., *The Consent Decree Program of the Department of Justice*, p. 7 (Comm. Print. 1959).

negotiation of such judgments, there is inevitably great give and take on both sides, and the decision by each side on how far to compromise depends on a number of factors. From the government's side, it involves the importance of the case, the strengths and weaknesses of the evidence, and the likelihood of success both on the merits and in obtaining all the relief deemed appropriate. There are cases in which the government, during the course of consent decree negotiations, abandons particular items of relief which it would seek if the case went to trial and it prevailed, solely in order to reach a settlement of the case.

If, however, a district court, after there has been some preliminary agreement between the government and the defendants as to the scope of a decree but before the facts as to the alleged violation have been fully established, can terminate the litigation by deciding what relief it deems appropriate without hearing evidence, the inevitable effect would be a weakening of the antitrust enforcement program of the Department of Justice. For government negotiators would be understandably reluctant to offer any concessions, even in preliminary negotiations, if such concessions could be used by the defendants as a basis for seeking entry of a judgment to which, if the negotiations had continued, the government never would have consented. Conversely, antitrust defendants would be well advised never to accede to a consent decree proposed by the government without first seeking more favorable terms from the district court. They would have everything to gain and nothing to

lose by urging the district court to enter their proposed decree without trial unless the government could prove that it was inadequate, while at the same time preserving their right to go to trial if the court should reject their proposal.[4] Such a one-way street is the antithesis of the basic concept of pretrial settlement upon which the negotiation of consent decrees rests.

CONCLUSION

This appeal presents a substantial question of public importance in the administration of the antitrust laws. Probable jurisdiction should be noted.

Respectfully submitted.

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Solicitor General.

LEE LOEVINGER,
Assistant Attorney General.

LIONEL KESTENBAUM,
PATRICK M. RYAN,
Attorneys.

APRIL 1963.

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[4] That is precisely what the appellees did in the present case:

THE COURT: Let me say this now: That I'm going to enter your Decree, or the Government's Decree, one, see? I'm going to enter a Decree here. I'm not just going to enter an Order after this thirty days expires, saying that we'd better go on to trial.

Isn't that understood?

MR. DUNLAP [defense counsel]: No, sir.

MR. STUCKEY [government counsel]: No, sir.

THE COURT: It isn't?

MR. DUNLAP: No, sir, because I think we clearly withheld that at the last hearing. * * * That was the last thing I said and I believe one of the first things we said, that we did not agree that we were foreclosed from a right to go to trial if you decided to enter the Government's Decree. [Transcript, hearing on June 14, 1962, pp. 89–90.]

APPENDIX A

United States District Court, Middle District of Florida, Jacksonville Division

Civil No. 4735–Civ–J

UNITED STATES OF AMERICA, PLAINTIFF

v.

WARD BAKING COMPANY, ET AL., DEFENDANTS

ORDER

This cause came on to be heard on June 14, 1962 on defendants' motion for entry of judgment and upon the plaintiff's opposition thereto. All parties were represented before the court. The situation confronting the court can be best understood by a review of the record and events in this case, and in the companion criminal antitrust action, Criminal Action No. 11677 Crim–J.

On March 6, 1961 an indictment was returned by the Grand Jury in this district, charging that Ward Baking Company, American Bakeries Company, Derst Baking Company, Flowers Baking Company, Inc. and Southern Bakeries Company had engaged in a combination and conspiracy in unreasonable restraint of trade and commerce in violation of Section 1 of the Sherman Act. The combination and conspiracy complained of consisted of an agreement among the defendants (1) to allocate among themselves the business of supplying bakery products to Federal Naval Installations in the Jacksonville area which encompassed Northeast Florida and Southeastern Georgia, and (2) to submit non-competitive, collusive and rigged bids

and price quotations for supplying bakery products to the Federal Naval Installations in the said Jacksonville area.

On April 10, 1961 the arraignment in the criminal action took place. All of the defendants asked leave to interpose pleas of nolo contendere. After argument before the court, the court granted such leave, accepted the defendants' pleas of nolo contendere, and imposed substantial fines on each defendant.

Thereafter, on July 21, 1961 the United States of America filed a civil complaint against the same defendants based upon the same facts as were presented in the companion criminal antitrust action No. 11677–J. In Count One of the complaint so filed in this cause, the plaintiff charged the defendants with violations of the False Claims Act (31 U.S.C. Sects. 231–233) and requested forfeitures and double the amount of damages suffered by the plaintiff due to defendants' acts.

In Count Two of the civil complaint, the plaintiff alleged violation of Section 1 of the Sherman Act, charging the defendants with allocating among themselves the business of supplying bakery products to the United States Naval Installations in the Jacksonville area and with submitting non-competitive, collusive and rigged bids and price quotations for supplying bakery products to the United States Naval Installations in that area.

The plaintiff then asked that the defendants be enjoined from

(1) Allocating among themselves the business of supplying bakery products (meaning bread and rolls) to the United States Naval Installations in the Jacksonville area, defined as the Northern part of the State of Florida and the Southeastern part of the State of Georgia, and from

(2) Submitting non-competitive, collusive and rigged bids and price quotations for supplying bakery products to the United States Naval Installations in the Jacksonville area.

The plaintiff also asked for such further, general and different relief as the nature of the case may require and the court may deem appropriate in the premises.

During the months of March and April of 1962, the defendants negotiated with the plaintiff in an effort to dispose of this civil action, on the basis of the payment of moneys sought in Count One and a consent decree as to Count Two. The parties were able to agree on a monetary settlement of Count One, but were unable to agree to a form of proposed judgment to settle Count Two.

On May 8, 1962 a hearing was held by the court on all remaining issues in the case. Count One was settled by the payment by the defendants of the sum of $44,000. At the same time the defendants filed with the court a motion for entry of judgment, attaching to said motion a proposed form of Judgment on Count Two which, if entered, would grant the specific relief against the defendants which had been requested by plaintiff in paragraph (b) of its prayer for relief. The plaintiff's attorney also tendered to the court a proposed form of judgment on Count Two. At the conclusion of this hearing the court issued an order to show cause why defendants' motion for entry of a judgment on Count Two should not be granted and why the proposed judgment tendered therewith should not be entered. The plaintiff did not, in response to the order to show cause, file or attempt to file any amendments to the complaint relating to the facts upon which the injunctive relief

was prayed for or to broaden the scope of the injunctive relief requested.

Prior to the hearing on said order to show cause, the defendants filed an amended motion for entry of judgment, which substantially expanded the scope of the judgment as originally proposed by them, and affidavits were filed by the parties. The amended proposed judgment enlarged the scope of the injunctive relief to cover sales of all types of bakery products and to expand the area of sales from sales to Naval Installations in the Jacksonville area to sales to the United States of America and its agencies or instrumentalities wherever located.

The proposed judgments as ultimately tendered to the court by the plaintiff and defendants were alike except in the following respects:

(1) The judgment proposed by defendants applied to the sale of bakery products to the United States of America, its agencies or instrumentalities. That proposed by the plaintiff applied to the sale of bakery products to third persons and was not limited to sales to the United States of America, its agencies and instrumentalities.

(2) The judgment proposed by the plaintiff enjoined the defendants from urging or requiring any seller of bakery products to adhere to any particular price or other terms or condition of sale for bakery products.

The court notes that the injunctive aspects of the judgment proposed by the defendants are much broader than the relief specifically requested by the plaintiff in its complaint as to the type of products involved, the geographical area covered, and the classes of customers who would be affected. The complaint as filed concerned only sales of bread and rolls

to Naval Installations in the restricted Jacksonville area.

The demand of the plaintiff as to the inclusion of the two controversial provisions in its tendered judgment does not have a reasonable basis under the circumstances here present. The insistence of the plaintiff on the inclusion thereof constitutes arbitrary and unauthorized conduct in view of the intent of Congress to encourage consent decrees pursuant to Section 5 of the Clayton Act and thus avoid a costly and protracted trial for the parties. See *Twin Ports Oil Co.* v. *Pure Oil Co., et al.*, (D.C. Minn. 1939), 26 F. Supp. 366; *U.S.* v. *Brunswick-Balke-Collender Co.*, (D.C. Wisc. 1962), 203 F. Supp. 657.

On this record the form of the proposed judgment tendered by the defendants appears to provide the plaintiff with every safeguard needful to accomplish the prevention and restraint of the violations of the Sherman Act as set forth in the complaint and grants a restraint much broader than the relief prayed for by the plaintiff. Based upon this court's knowledge of the facts involved in Case No. 11677–Crim–J and this record, the proposed judgment which the court is entering provides all the relief to which the plaintiff would be entitled after the entry of a decree pro confesso against each defendant and after a trial on the allegations of this complaint.

It appears to the court that the Department of Justice, by withholding its consent to the proffered judgment, is frustrating the clear intent of Congress to encourage early entries of injunctional decrees without long and protracted trials, and that the government is attempting to place the defendants in the position of either capitulating to an arbitrary and unauthorized demand, or undergoing the ordeal of a long and costly trial.

The mere fact that a court has found a defendant has committed an act in violation of a statute does not justify an injunction broadly to obey the statute and thus subject the defendant to contempt proceedings if he shall at any time in the future commit some new violation unlike and unrelated to that with which he was originally charged. *N.L.R.B.* v. *Express Publishing Co.* 1944, 313 U.S. 246, 435–436, 61 S. Ct. 693, 699, 85 L. Ed. 930.

This court sitting as a court of equity has power to afford the defendants relief. *U.S.* v. *Brunswick-Balke-Collender Co.* (E.D. Wisc. 1962), 203 F. Supp. 657.

The amended motion of the defendants, Ward Baking Company, American Bakeries Company, Derst Baking Company, Flowers Baking Company, Inc. and Southern Bakeries Company for entry of judgment is hereby granted.

Dated at Tampa, Florida this 10th day of December, 1962.

[S] BRYAN SIMPSON, *Chief Judge.*

APPENDIX B

United States District Court, Middle District of Florida, Jacksonville Division

Civil No. 4735–Civ–J

UNITED STATES OF AMERICA, PLAINTIFF

v.

WARD BAKING COMPANY, AMERICAN BAKERIES COMPANY, DERST BAKING COMPANY, FLOWERS BAKING COMPANY, INC., AND SOUTHERN BAKERIES COMPANY, DEFENDANTS.

FINAL JUDGMENT—COUNT II

Plaintiff, United States of America, having filed its complaint herein in two Counts on July 21, 1961 and final judgment having been entered on Count I of the complaint and the defendants, by their respective attorneys, having filed a Motion for Entry of a Judgment along with amendments in conformity thereto with the relief sought by the plaintiff in its complaint, without trial or adjudication of any of the issues of fact or law herein and before the taking of any testimony, it is hereby

ORDERED, ADJUDGED AND DECREED upon Count II of the complaint as follows:

I

This Court has jurisdiction of the subject matter hereof and of the parties consenting hereto and Count II of the complaint states a claim upon which relief may be granted against the defendants under Section 1 of the Act of Congress of July 2, 1890, entitled "An

Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies" commonly known as the Sherman Act, as amended.

II

The provisions of this final judgment applicable to any defendant shall apply also to each of its subsidiaries, successors, assigns, officers, directors, agents and employees, and to all other persons in active concert or participation with such defendant who shall have received actual notice of this final judgment by personal service or otherwise.

III

Each of the defendants is enjoined and restrained from directly or indirectly entering into, adhering to, or claiming or maintaining any right under any contract, agreement, arrangement, understanding, plan or program with any other person to:

(a) Submit noncompetitive, collusive or rigged bids, or quotations for supplying any bakery products to United States of America, its agencies or instrumentalities, or

(b) Allocate, divide or rotate the business of supplying any bakery products to United States of America, its agencies or instrumentalities.

IV

Each defendant is enjoined and restrained from directly or indirectly disclosing to or exchanging with any seller of bakery products the intention to submit or not submit a bid or quotation for supplying bakery products to United States of America, its agencies or instrumentalities, the fact that such a bid or quotation has or has not been submitted or made, or the content or terms of any such bid or quotation.

V

Each defendant is ordered and directed for a period of five years after the date of entry of this final judgment, to submit a sworn statement in the form set forth in the Appendix hereto with each bid for bakery products submitted to any governmental agency of the United States of America (unless such installation requires the submission of a different type of sworn statement to the same effect), such sworn statement to be signed by the person actually responsible for the preparation of said bid.

VI

For the purpose of securing compliance with this final judgment duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to any defendant made to its principal office, be permitted, subject to any legally recognized privilege and with the right of said defendant to have counsel present:

(a) Reasonable access during the office hours of said defendant, to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of said defendant, relating to the supplying of bakery products to the United States of America, its agencies and instumentalities; and

(b) Subject to the reasonable convenience of said defendant, and without restraint or interference, to interview officers and employees of said defendant, who may have counsel present, regarding such matters contained in this final judgment.

Upon such written request of the Attorney General, or the Assistant Attorney General in charge of

the Antitrust Division, the said defendant shall submit such written reports with respect to supplying bakery products to any governmental agency of the United States of America.

No information obtained by the means permitted in this Section shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the plaintiff except in the course of legal proceedings for the purpose of securing compliance with this final judgment in which the United States is a party or as otherwise required by law.

VII

Jurisdiction is retained for the purpose of enabling any of the parties to this final judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this final judgment, for the modification or termination of any of the provisions thereof, for the enforcement of compliance therewith, and punishment of violations thereof.

DATED at Tampa, Florida this 10th day of December, 1962.

BRYAN SIMPSON, *United States District Judge.*

APPENDIX

AFFIDAVIT

The undersigned hereby certifies to his best knowledge and belief that:

(1) The bid to _____ (name of recipient of bid) dated _____ has not been prepared by _____ (name of defendant) in collusion with any other seller of bakery products, and

(2) The prices, terms or conditions of said bid have not been communicated by the undersigned nor by any employee or agent of _____ (name of defendant), to any other seller of bakery products and will not be communicated to any such seller prior to the official opening of said bid,

in violation of the Final Judgment in Civil No. 4735–Civ.–J entered by the United States District Court for the Southern District of Florida, Jacksonville Division, on _____, 1962.

Dated: _____, 1962

U.S. GOVERNMENT PRINTING OFFICE: 1962

No. 101

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

UNITED STATES OF AMERICA,

Appellant,

v.

WARD BAKING CO., *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

MOTION TO AFFIRM.

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WARD BAKING CO., *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

MOTION TO AFFIRM.

Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that the final judgment and decree of the district court be affirmed on the ground that the question is so unsubstantial as not to warrant further argument.

Opinion Below.

The opinion of the district court (Appendix A to the Jurisdictional Statement, pp. 16-21) is not yet reported.

Jurisdiction.

The jurisdictional requisites are sufficiently stated in the Jurisdictional Statement.

Statutes and Rules Involved.

The statutes and rules involved are sufficiently stated in the Jurisdictional Statement with the exception of Rule 16 of The Federal Rules of Civil Procedure (28 U. S. C. A.) which provides in pertinent part:

> In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider
>
> (1) The simplification of the issues;
>
> (2) The necessity or desirability of amendments to the pleadings;
>
> . . .
>
> (6) Such other matters as may aid in the disposition of the action.

Question Presented.

Appellees filed a motion for entry of a judgment against them providing more extensive injunctive relief than would have been required were the allegations of the complaint proved in their entirety. The district court, as part of its pre-trial procedure, issued an order to show cause why appellees' motion for entry of judgment against them should not be granted. The government in response to said order offered neither to amend its complaint, nor to disclose any evidence that would justify more extensive relief than that provided by the proposed judgment, and took the position that "the Government was under no duty to reveal all of its evidence in answer to the rule nisi." The district court thereupon entered its final judgment in the form proposed by appellees. Under these circumstances, is the government entitled to a trial as opposed to the entry of the judgment?

Statement.

The following facts should be added to the statement contained in the government's Jurisdictional Statement in order that this Court may properly consider the question at issue.

On February 8, 1962, the district court gave notice to all parties that the case was "set for hearing and disposition of all pending matters and preliminary pretrial conference on March 22, 1962 at 10:00 A. M. with a view to narrowing of issues, limitation of discovery, and other pertinent matters. Counsel should attend this hearing prepared to discuss date for final pretrial hearing and for date of Trial". This hearing was held.

On May 8, 1962, a pre-trial conference was had "on all remaining issues"[1] in the case. Thereupon, appellees filed with the court a motion for entry of judgment to which was attached a proposed form of judgment on Count II covering all the allegations of fact and specific prayers of the complaint, and more.[2] Appellant also tendered to the court a proposed form of judgment on Count II which was different from that of appellees.

The district court, effectively to utilize pre-trial procedures, ordered appellant to show cause why the court should not enter the judgment proposed by appellees and afforded appellant every reasonable opportunity to comply with its order.[3] Thereafter, appellant failed and refused to comply with said order in that it did no more than submit

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[1] Order To Show Cause, dated May 8, 1962.

[2] See appellees' Motion for Entry of Consent Judgment, dated May 8, 1962; appellees' Amended Motion for Entry of Judgment, dated June 6, 1962.

[3] The district court's Order To Show Cause, dated May 8, 1962, provided for a "written formal reply" by appellant and, in addition, a formal hearing thereon. At the conclusion of said hearing, held on June 14, 1962, appellant declined the opportunity of a

a list of three objections[4] to which appellant limited its oral argument.[5] At no time did appellant attempt to amend its allegations of fact or specific prayers for relief.[6] Nor did appellant submit any affidavits or disclose any evidence in support of the broad scope of injunctive relief which, it asserted, was required by the facts alleged. Instead, appellant maintained that it was not required to disclose its evidence in response to the court's order[7] and indicated that the burden was on appellees to show that there was no basis for the more extensive relief demanded by appellant.[8]

Prior to the pre-trial hearing on June 14, 1962, appellees filed an amended motion for entry of judgment which eliminated all reference to a consent judgment and which substantially expanded the scope of the judgment as originally proposed.[9]

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rebuttal argument, whereupon the court granted 30 days within which appellant was permitted to file a reply brief if it so desired. See Transcript, hearing on June 14, 1962, pp. 76, 81; Order, dated June 22, 1962, p. 2.

[4] See appellant's Statement of Objections in Response to Show Cause Order, dated May 31, 1962.

[5] See Transcript, hearings on June 14, 1962, pp. 18, 26-35.

[6] "The plaintiff [appellant] did not, in response to the order to show cause, file or attempt to file any amendments to the complaint relating to the facts upon which the injunctive relief was prayed for or to broaden the scope of the injunctive relief requested." Order, dated December 10, 1962, p. 3.

[7] "[T]he Government was under no duty to reveal all of its evidence in answer to the rule *nisi*." Appellant's Reply Brief and Statement of Government's Position Re Entry of Defendants' Second Proposed Judgment, dated July 13, 1962, p. 3.

[8] "The defendants [appellees] have offered no proof which would justify the Court in holding that a repetition of the offense in another place with respect to other products sold by them is unlikely." Plaintiffs Memorandum in Support of Its Opposition to Motion For Entry of Consent Judgment, dated June 14, 1962, p. 5.

[9] Appellant, in its Jurisdictional Statement, fails to make clear that appellees' amended motion for entry of judgment filed June 8, 1962, removed all reference to a "consent" judgment. The district court's judgment cannot properly be termed a "consent" judgment.

Between February 8, 1962, and June 14, 1962, the parties made concessions and submitted alternative proposed judgments as to Count II, leaving unresolved only one substantial issue, viz., the injunction against conspiring to fix prices of bakery products covered only sales to the federal government, its agencies and instrumentalities, rather than to the general public as well.[10]

These facts and the statement of the government in its Jurisdictional Statement (omitting the reference to Case No. 11676-Crim-J which is completely dehors the record) constitute the facts to be considered by this Court in support of this motion to affirm.

ARGUMENT.

I. THIS CASE INVOLVES A QUESTION OF PRE-TRIAL PROCEDURE RATHER THAN A QUESTION CONCERNING THE ADMINISTRATION AND ENFORCEMENT OF THE ANTITRUST LAWS.

Appellant, in its Jurisdictional Statement, seeks to magnify beyond reasonable proportions the importance of the case at bar by contending that the question presented is one relating to the administration and enforcement of the anti-

[10] Henry Stuckey, trial attorney for appellant, stated "I think the only argument left with this new judgment, your Honor, is the fact that the Judgment Section wants the decree to go to the general public, not just government installations, and the three-year period extended to five years. I believe it can be summed down to that; at least that's the way I read it at the present time, without having much time to study it." Transcript, Hearing on June 14, 1962, p. 37.

The government agreed to a modification of the provision against appellee's "urging or suggesting to any seller of bakery products the quotation or charging of any price or other terms or conditions of sale of bakery products" by permitting appellees to print the suggested retail price of their products on the package (preticketing). Jurisdictional Statement, p. 6. See Affidavit of M. H. Blackshear, Jr., p. 4, attached to appellees Amended Motion for Entry of Judgment, dated June 6, 1962.

trust laws. In fact, appellant has devoted its entire argument to the matter of consent decrees and negotiations pursuant thereto without discussing the real problem.

Certainly, appellant cannot deny that it failed, in response to the order to show cause, to disclose to either the court or appellees its evidence, if any it had, which would entitle it to relief broader than that proffered by appellees. While appellees concede that non-disclosure of such evidence would perhaps enhance appellant's bargaining position with respect to consent decree negotiations, appellant must suffer the consequences if it withholds such evidence after a pre-trial order reasonably requiring disclosure.

It may be said that one of the main purposes of the pre-trial procedure, especially in protracted cases is a determination of the issues for trial.[11] Mr. Justice Brennan best summed up the intent and purpose of the pre-trial procedure when he stated:

> "* * * The public is fed up with systems under which neither side of lawsuit knows until the actual day of trial what the other side will spring in the way of witnesses or facts. The technique of playing the cards close to the vest and hoping by surprise or maneuver at the trial to carry the day, whether or not right and justice hes on the side of one's client, won't be tolerated. It was and is great sport, but hardly defensible as a system for determining causes according to truth and right. In pretrial procedure, made effective through a precedent broad discovery practice, lies the best answer yet devised for destroying surprise and maneuver as twin allies of the sport.

[11] See *Syracuse Broadcasting Corp.* v. *Newhouse*, 271 F. 2d 910, 914 (2d Cir. 1959); see also *Seminars on Protracted Cases for United States and District Judges*, 23 F. R. D. 319, 21 F. R. D. 395; *The Report on Procedure in Anti-Trust and Other Protracted Cases Adopted by the Judicial Conference of the United States*, 13 F. R. D. 62.

ing theory of justice." [*Package Mach. Co.* v. *Haysen Mfg. Co.*, 164 F. Supp. 904, 910 (E. D. Wis. 1958), *aff'd*, 266 F. 2d 56 (7th Cir. 1959), quoting Mr. Justice Brennan's address to the American College of Trial Lawyers, April, 1958.]

Obviously, pre-trial procedure would be useless if litigants were permitted to reveal or conceal at their pleasure. To effectuate the procedure litigants are required to cooperate with the court. Indeed, the parties at a pre-trial conference "owe a duty to the court and opposing counsel to make a full and fair disclosure of their views as to what the real issues at the trial will be." *Cherney* v. *Holmes*, 185 F. 2d 718, 721 (7th Cir. 1950). This duty, of course, applies to the federal government just as it does to private litigants. *E.g.*, *Daitz Flying Corp.* v. *United States*, 4 F. R. D. 372, 373 (E. D. N. Y. 1945), *rev'd on other grounds*, 167 F. 2d 369 (2d Cir. 1948). Therefore, appellant's contention that it was not required to disclose its evidence in response to the district court's order to show cause is without merit.

While appellant concedes that it is "not entitled to a trial in order to conduct a fishing expedition"[12], the language used in its Jurisdictional Statement indicates that appellant has very little, if any, admissible evidence to support its claim for injunctive relief broader than that proffered by appellees.[13]

As was stated in the case of *Package Mach. Co.* v. *Haysen Mfg. Co.*, 164 F. Supp. 904, 910 (E. D. Wis. 1958), *aff'd*, 266 F. 2d 56 (7th Cir. 1959):

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[12] Jurisdictional Statement, p. 10.

[13] "[T]he additional provisions sought by the government *might* well turn out to be necessary . . . ." Jurisdictional Statement, p. 9. (Emphasis added.) "Of course, after a trial the district court *might* have concluded that the facts developed showed no need for relief any broader than that proposed by the appellees." Jurisdictional Statement, p. 10. (Emphasis added.)

> The court was not required to stand by and permit plaintiff to rest on its general statements of claimed trade secrets and await the outcome of a long expensive trial to see what the alleged trade secrets were. Cf. *Holcomb* v. *Aetna Life Insurance Co.*, *supra*. Nor should the defendants have to wait until plaintiff puts in its case to see what it has to defend against.
>
> Throughout the many motions concerning whether plaintiff has made a definite enough statement of its claimed trade secrets, counsel for the plaintiff has repeatedly retreated to the position that he need only state so much as to enable the defendants to plead. Suffice it to say that counsel seems unaware of Rule 16 and the purpose of pre-trial conferences to eliminate unnecessary lengthy trials.

In *Syracuse Broadcasting Corp.* v. *Newhouse*, 271 F. 2d 910 (2d Cir. 1959), the plaintiff did not properly comply with the district court's pre-trial order to furnish factual information in a protracted antitrust case. The Second Circuit sanctioned the use of drastic remedies in such a case to see that the issues were clearly defined so that the whole case might be kept within manageable proportions, saying at 915:

> It must be remembered that a preclusion order is a drastic remedy . . . and while the district court clearly has the power to issue such an order . . . that power should be exercised only to the extent necessary to achieve the desired purpose—that is, an entirely just disposition of the case in a speedy and efficient manner. Of course in view of its intimate knowledge of the facts, discretion must be accorded the district court in its resolution of these administrative problems. (Citations omitted.)

In the Handbook of Recommended Procedures for the Trial of Protracted Cases adopted by the Judicial Con-

ference of the United States in March 1960, there is a recommendation that in civil antitrust suits brought by the government one or more pre-trial conferences should be devoted to the question of the relief sought by the plaintiff. See, 25 F. R. D. 398. The Handbook, in discussing that recommendation, suggests that a pre-trial discussion be held to determine what relief would be appropriate were the allegations of the complaint proved in their entirety, with a view that discussion of this type made at pre-trial conferences may dispose of the case without trial. To show that concentration on the question of relief in the pre-trial stages can ultimately lead to the settlement of cases, the Handbook cites the case of *United States* v. *Standard Oil Co.*, 1958 CCH Trade Cas., ¶69,212 (S. D. Cal. Oct. 31, 1958). In that case the government had brought a suit against several of the major oil companies charging a conspiracy to restrain and monopolize trade in petroleum products on the West Coast of the United States. The government's complaint sought, *inter alia*, divestiture of the marketing facilities of the defendants. The court held a pre-trial hearing at which counsel were requested to assume that the case had been tried as to liability and that the court had sustained the allegations of the complaint. The question was then posed as to whether the court could, should or would grant divestiture of defendants' marketing facilities as part of the relief granted. Counsel were asked to submit by briefs the relevant facts to be used as a basis for their showing and argument. After hearing and before trial, the district court ruled that it would not grant the government's prayer for relief requesting divestiture of the marketing facilities of the defendants, stating at p. 74,764:

> Well, to get down to the problem of what type of relief the Court could grant in this case. I have come

> to the conclusion that if this case were tried and the defendants were shown to have been in conspiracy to restrain trade and commerce and to monopolize, and assuming the showing made by the defendants as made in this hearing this week, and assuming also the validity of certain matters mentioned by Mr. Lehman [government counsel]—such as irregularities, misconduct, activities since 1950—that this Court should not and would not grant divestiture or divorcement of these service stations.

The order to show cause in the case now at bar served as a pre-trial order requiring the government to come forward with statements of its facts to support the issues which it claimed were essential for trial. When the government elected to withhold any factual information which it might have had to support the injunctive relief relating to sales of bakery goods to the general public, the district judge could properly consider that issue as nonessential for trial. Since appellees requested in their motion that the district judge enter a judgment as if all the allegations of the complaint were proven as true, there were no issues for trial. On the record before it, the court then could consider the case ripe for final disposition. Accordingly, the court entered at pre-trial its final judgment.

Appellant cannot successfully contend that the district court was without power to enter such a judgment during pre-trial. *American Mach. & Metals, Inc.* v. *De Bothezat Impeller Co.*, 82 F. Supp. 556 (S. D. N. Y. 1949) (pre-trial order may pass judgment upon the legal sufficiency of a defense); *Lane* v. *Brown*, 63 F. Supp. 684 (E. D. Mich. 1945) (where no valid service of process, the district court was authorized at a pre-trial hearing to proceed to judgment); *Silvera* v. *Broadway Dep't Store, Inc.*, 35 F. Supp. 625 (S. D. Cal. 1940) (court has power at pre-trial to dis-

miss when the facts admitted and proof show no cause of action). "Since the parties at pre-trial conference agreed upon all necessary and relevant facts and exhibits, a decision on the merits may be entered without formal trial." *Newman* v. *Granger*, 141 F. Supp. 37, 39 (W. D. Pa. 1956), *aff'd per curiam*, 239 F. 2d 384 (3d Cir. 1957).

Furthermore, in the case of *United States* v. *Brunswick-Balke-Collender Co.*, 203 F. Supp. 657 (E. D. Wis. 1962), an action by the United States to restrain alleged violations of the Sherman Act, the court, after holding that the government was not entitled to the inclusion in a somewhat similar decree of a particular controversial provision, further held at 662:

> [T]his court sitting as a court of equity is not powerless under such circumstances to afford the defendants a form of relief other than the Hobson's choice of either further capitulating to an arbitrary and unauthorized demand of the Government or undergoing the ordeal of a costly and protracted trial.

A district court took similar action in *United States* v. *Aero Mayflower Transit Co.*, 1956 CCH Trade Cas., ¶ 68,526 (S. D. Ga. Sept. 20, 1956). Thus, it is apparent that a district court may, in appropriate circumstances, enter final judgment at the pre-trial stage—even in antitrust litigation and over the objection of the government.

Appellant has very appropriately conceded that a district court, in entering such final judgment, has a wide range of discretion to mold an antitrust decree to the exigencies of the particular case.[14] Appellant has also stated that the Attorney General's "authority to make determinations includes the power to make erroneous decisions as well as

[14] Jurisdiction Statement, p. 8.

correct ones.'"[15] It is well to note that such language has also been applied regarding the trial judge's formulation of issues under Rule 16 Fed. R. Civ. P. during the pre-trial procedure. See *Life Music, Inc.* v. *Edelstein*, 309 F. 2d 242, 243 (2d Cir. 1962) (per curiam), where the Second Circuit entered a pre-trial order tentatively defining the issues, which order was entered over the objections of a party who refused formal manifestation of assent thereto.

If appellant is sustained in the position it took in the court below, the inevitable effect would be to thwart and destroy the pre-trial procedures which have been so carefully worked out by the courts over the past several decades, and which are indispensable in the proper disposition of protracted cases.

Accordingly, this appeal presents no substantial question of public importance in the administration and enforcement of the antitrust laws.

II. THE EXERCISE OF THE DISTRICT COURT'S DISCRETION PRESENTS NO SUBSTANTIAL QUESTION FOR DETERMINATION ON APPEAL.

This case does not raise any substantial question within the meaning of Rule 16 of the Revised Rules of the Supreme Court of the United States. Actually the case merely presents a situation where the government is requesting this Court to review the exercise of a trial judge's discretion. The government contests the decree entered by the trial judge in only one major point as shown in the previous Statement. See note 10 *supra* and accompanying text.

This Court has recognized the "wide range of discretion in the District Court" to adapt its decree in Sherman Act

[15] Jurisdictional Statement, p. 13.

cases to the particular case before it and has stated that it "will not direct a recasting of the decree except on a showing of abuse of discretion." *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 185 (1944). See *Timken Roller Bearing Co.* v. *United States*, 341 U. S. 593 (1951). The purpose of an injunction in a Sherman Act case is not to punish the defendant. *International Salt Co.* v. *United States*, 332 U. S. 392, 401 (1947). It is to prevent continued or future violations of the Sherman Act. *United States* v. *National Lead Co.*, 332 U. S. 319, 335 (1947). The test of the success of a civil suit is whether it effectively pries "open to competition a market that has been closed by defendants' illegal restraints." *International Salt Co.* v. *United States, supra* at 401. Because the review is of the trial court's discretion the government "must demonstrate that there was *no reasonable basis* for the District Judge's decision." *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 634 (1953). (Emphasis added.)

In numerous instances this Court in antitrust cases has refused to modify the district judge's decree because the drafting of the decree is left to his discretion. See, *e.g.*, *Maryland and Virginia Milk Producers Ass'n*, v. *United States*, 362 U. S. 458 (1960); *International Boxing Club* v. *United States*, 358 U. S. 242 (1959); *United States* v. *W. T. Grant Co.*, 345 U. S. 629 (1953); *United States* v. *National Lead Co.*, 332 U. S. 319 (1947); *Associated Press* v. *United States*, 326 U. S. 1 (1945). Admittedly, the relief granted by the district court can exceed the proven violation, but this Court has pointed out that when this is done, the Court must "be especially wary lest the trial court overstep the correspondingly narrower limits of its discretion...." *International Boxing Club* v. *United States*, 358 U. S. 242, 262 (1959). Certainly the trial judge is not required nor

expected to go beyond the proven violation in order to discharge his duty.

The government relies heavily on *United States* v. *Hartford-Empire Co.*, 1 F. R. D. 424 (N. D. Ohio 1940). There the district court refused to enter a decree, denominated by one of the defendants as a "consent decree," proposed in a pre-trial conference. Actually that case presents a dramatic vindication of the procedure used by the district judge in disposing of the present case. When *Hartford-Empire Co.* finally reached the Supreme Court there had already been a trial which had lasted 112 days, a district court opinion comprising 160 pages including 628 findings of fact and 89 conclusions of law, a 46-page decree and a 16,500-page record. *Hartford-Empire Co.* v. *United States*, 323 U. S. 386, 392 (1945).

In *Hartford-Empire Co.*, this Court first affirmed the district court's findings of Sherman and Clayton Act violations, which is not surprising when it is realized that the defendants had sought in the district court to have a decree entered against themselves. This Court then said at 323 U. S. at 409-10:

> [T]he court may not create, as to the defendants, new duties, prescription of which is the function of Congress, or place the defendants, for the future, 'in a different class than other people,' as the Government has suggested. The decree must not be 'so vague as to put the whole conduct of the defendants' business at the peril of a summons for contempt'; enjoin 'all possible breaches of the law'; or cause the defendants hereafter not 'to be under the protection of the law of the land.' With these principles in mind we proceed to examine the terms of the decree entered. (Footnotes omitted.)

The *Hartford-Empire Co.* case is a vivid illustration of the magnitude and consumption of manpower and money involved in protracted Sherman Act litigation.[16]

In *United States* v. *United States Gypsum Co.*, 340 U. S. 76 (1950), another case upon which the government relies, this Court extended the "territory" of the decree from the "eastern territory of the United States" to all of the United States. This is not as significant as first might appear because the "eastern territory" covered the United States as far west as New Mexico and Wyoming (see *United States* v. *United States Gypsum Co.*, 67 F. Supp. 397, 404 & n. 2 (D. D. C. 1946)), and therefore the extension was actually nominal. Furthermore, in *Gypsum* this Court was faced with policing an entire nationwide industry in which the three companies conspiring to monopolize controlled 89% of the market. *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 368-69 (1948).

Contrasted to that is the present case where the only alleged violation is an isolated one in an infinitesimal area of commerce: sales to naval installations in the Jacksonville, Florida, area. This case does not involve an industry-wide conspiracy, but only a local pocket. Merely because a certain type of relief is granted in one case does not mean that the failure of the court in another case to grant this relief is an abuse of discretion. See *United States* v. *National Lead Co.*, 332 U. S. 319, 338, 358-60 (1947).

In a recent case, *United States* v. *Brunswick-Balke-Collender Co.*, 203 F. Supp. 657 (E. D. Wis. 1962), a district court entered a decree over the objection of the govern-

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[16] Contrast the expenditure of manpower and money in that case with the economy effected by concentration in the pre-trial stages on the question of appropriate relief as found in *United States* v. *Standard Oil Co.* and the *Handbook of Recommended Procedures for the Trial of Protracted Cases*, discussed *supra* at pages 8-9.

ment. That opinon is noteworthy because the district judge points out that the government, by attempting to include unreasonable provisions in consent decrees, is in effect frustrating the consent decree policy of Congress. In the present case, the district court merely entered a decree which it believed adequately concluded the litigation.

The government has characterized the basic error of the trial court as its refusal to hear evidence to make an informed judgment as to how broad the relief in this case should be. Jurisdictional Statement, p. 9. In the presentation of its argument in the district court, counsel for the government pointed out that a trial would provide an adjudication of guilt and would also "result in the public exposure of the defendants' unlawful activities. . . ."[17] Appellees contend that to allow the government to burden the district court with a costly trial because the government wants public exposure and an adjudication of guilt would misuse the concept of civil litigation. Actually the government obtained an adjudication of guilt for the purposes of the case when appellees pleaded *nolo contendere* in case No. 11677-Crim-J. See, *Hudson* v. *United States*, 272 U. S. 451 (1926). Moreover, there was public exposure as a result of the indictment and the fines imposed pursuant to the *nolo contendere* pleas. Even then the government was not satisfied; it wanted a trial.[18]

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[17] Transcript, Hearings on June 14, 1962, p. 30. The government also stated that a trial would afford the opportunity to offer evidence in support of its claim for injunctive relief broader than that offered in appellees' proposed judgment. Neither then nor at any other time did the government state to the district court that it had such evidence or the nature of the evidence it would offer at a trial.

[18] The public exposure sought so vigorously in the district court by appellant (Plaintiff's Memorandum in Support of Its Opposition to Motion for Entry of Consent Judgment, dated June 14, 1962, p. 4; Transcript, Hearings on June 14, 1962, page 30) was not presented here in the Jurisdictional Statement.

In the case at bar, the district court in paragraph VII of its decree expressly retained jurisdiction:

> Jurisdiction is retained for the purpose of enabling any of the parties to this final judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this final judgment, for the modification or termination of any of the provisions thereof, for the enforcement of compliance therewith, and punishment of violations thereof.

It is manifestly clear from this provision of the decree that the government is not precluded from applying to the court for modification of the injunction or for any additional remedies which are required for the effective administration of the antitrust laws as to any violations flowing from the alleged unlawful activities of appellees.[19]

This Court has repeatedly emphasized the prophylactic effect of the retention of jurisdiction by the district court. *International Salt Co.* v. *United States*, 332 U. S. 392 (1947); *Associated Press* v. *United States*, 326 U. S. 1 (1945). In *Associated Press* v. *United States*, *supra*, this Court, in refusing to grant the government's request that the injunction be broadened, because fashioning a decree rests largely in the district court's discretion and also because that court had retained jurisdiction, stated at 22-23:

> Furthermore, the District Court retained the cause for such further proceedings as might become necessary. If, as the government apprehends, the decree in its present form should not prove adequate

[19] The reference to "treble damages" on page 12 in the Jurisdictional Statement is irrelevant and misleading since all civil liability that could grow from the alleged violations has been satisfied. No judgment rendered on count II of the complaint could offer aid to private treble damage litigants.

to prevent further discriminatory trade restraints against non-member newspapers, the court's retention of the cause will enable it to take the necessary measures to cause the decree to be fully and faithfully carried out.

In the present case appellant suggests hypothetically that certain evidence could reveal the existence of a fact situation which would justify more relief. Jurisdictional Statement p. 9. In *International Salt Co.* this Court expressly refused to override the district court's discretion and modify the decree to meet a hypothetical objection because the district court had retained jurisdiction by a proviso in its decree which is substantively indistinguishable from the proviso in the present case.

In the case at bar, the district court sitting as a court of equity exercised on the record before it a sound judicial discretion. Appellant's effort to review this discretion does not present a substantial question.

Conclusion.

This appeal does not present a substantial question for determination by this Court, and the motion to affirm should be granted.

Respectfully submitted,

DAVISSON F. DUNLAP,
CHARLES L. GOWEN,
JOHN W. BALL,
JOHN B. MILLER,
JOHN H. BOMAN, JR.,
Attorneys for Appellees.

Certificate of Service.

I, CHARLES L. GOWEN, of counsel in the above case, acting on behalf of all of appellees herein and as a member of the Bar of the Supreme Court of the United States, hereby certify that on the day of May, 1963, I served copies of the foregoing Motion to Affirm upon appellant, the United States of America, by mailing three copies thereof to Lionel Kestenbaum, Esq., Department of Justice, Washington 25, D. C., and by mailing a copy thereof to Archibald Cox, Esq., Solicitor General, Department of Justice, Washington 25, D. C. Each of the foregoing was sent by Air Mail, postage prepaid.

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Attorney for American Bakeries Company, acting on behalf of the said client and other appellees named in the foregoing Motion.

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 101

UNITED STATES OF AMERICA, APPELLANT

v.

WARD BAKING COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the district court (R. 125) is not yet reported.

JURISDICTION

Final judgment in this case (R. 129) was entered on December 10, 1962 and the United States filed a notice of appeal on February 4, 1963 (R. 133). Probable jurisdiction was noted on June 10, 1963 (R. 143; 374 U.S. 803). The jurisdiction of this Court is conferred by Section 2 of the Expediting Act, 32 Stat. 823, as amended, 15 U.S.C. 29. *United States* v. *Parke, Davis & Co.*, 365 U.S. 125.

STATUTES INVOLVED

The Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1, *et seq.*, provides in pertinent part:

> SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. * * *
>
> * * * * * *
>
> SEC. 4. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. * * *

The Clayton Act, Section 5(a), 38 Stat. 731, as amended, 15 U.S.C. 16, provides as follows:

> SEC. 5. (a) A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 4A, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, That

this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under section 4A.

QUESTION PRESENTED

After consent decree negotiations in a civil antitrust suit had reached an impasse, the appellees requested the district court to enter an injunction which was narrower than that sought by the government. The question presented is whether the district court erred in entering the judgment proposed by the appellees, without the government's consent and without trial of the issues presented by the complaint.

STATEMENT

On July 21, 1961, the United States filed a complaint in two counts charging five bakery companies (the appellees) with combining and conspiring to allocate among themselves the business of supplying bakery products (defined as bread and rolls) to federal naval installations in the Jacksonville, Florida area, and to submit noncompetitive and rigged bids and price quotations on such business (R. 1–9). Count I charged that such conduct violated the False Claims Act (31 U.S.C. 231–233), and sought forfeitures and double damages as provided in that Act (R. 3–6). Count II charged that the conduct violated Section 1 of the Sherman Act, and sought the following relief: (1) an adjudication that appellees had violated that Act; (2) an injunction prohibiting appellees from allocating among themselves the business of supplying bakery products to federal naval installa-

tions in the Jacksonville area and submitting rigged bids for such business; and (3) "such further, general, and different relief as the nature of the case may require and the Court may deem appropriate * * *" (R. 6-9).

In March 1961, prior to the filing of the complaint, two related indictments had been returned in the court below. The five appellees were charged, in Case No. 11677-Crim-J, App. *infra*, p. 40, with violating Section 1 of the Sherman Act by committing substantially the same acts as were charged in Count II of the civil complaint. Four of the appellees and two other companies were charged, in Case No. 11676-Crim-J, App. *infra*, p. 35, with conspiring to fix the price of bread and rolls on sales to nongovernment "wholesale accounts," defined as "grocery stores, supermarkets, restaurants, hotels and similar large purchasers". In these two criminal cases, all defendants were convicted on their pleas of *nolo contendere* and fines were imposed.[1]

In the present civil case, settlement negotiations resulted in the parties' agreement to dispose of Count I by the appellees' payment of $44,000 (R. 42, 60).

The parties were unable to agree upon the terms of a consent decree to settle the Sherman Act count. At a pretrial conference on May 8, 1962, the appellees submitted a "Motion for Entry of a Consent Judgment" together with a copy of their proposed judg-

[1] District Judge Simpson accepted the *nolo* pleas over the government's objections. In opposing acceptance of the *nolo* pleas, government counsel briefly discussed the facts involved in the cases, but did not present in any detail the evidence which would have been introduced at trial.

ment to which the government had not consented (R. 34). The motion stated that the judgment was "framed in the language used by the Plaintiff in its prayer for relief" and that the judgment provided "every safeguard" needed to prevent and restrain the alleged violations (R. 36). The proposed judgment enjoined each of the appellees from agreeing to submit "noncompetitive, collusive or rigged bids, or quotations for supplying bakery products [defined as bread and rolls only] to United States Naval installations in the Jacksonville area," or to "[a]llocate, divide or rotate the business of supplying" bread and rolls to such installations; and from "disclosing to or exchanging with any seller of [bread and rolls]" its intent to submit or not submit a bid, or the terms of any such bid for supplying bread and rolls to such installations. The proposed judgment also required each appellee to submit a sworn statement of noncollusion with every bid for bread and rolls submitted to any naval installations in the Jacksonville area for three years after entry of the judgment (R. 39–40).

The terms upon which the government was prepared to settle the case were embodied in a proposed judgment which had previously been submitted to defendants and which was presented to the court at the hearing on May 8. The government sought an injunction against fixing of prices, rigging of bids, or allocation of customers, on sales of any bakery products to any person (R. 74); against urging or requiring any seller of bakery products to adhere to a particular resale price (R. 75); and against disclosing to

or exchanging with any seller of bakery products information on bids (R. 75). It also sought statements of non-collusion for five years on bids for any bakery products to any governmental agency (R. 75–76).

At the conclusion of the hearing on May 8, the court ordered the government to show cause why appellees' proposed judgment should not be entered (R. 44). The government filed objections and a supporting brief. The appellees then moved for "leave to file an amended motion for entry of consent judgment" (R. 52). Attached to their motion papers were an "Amended Motion for Entry of Judgment" and a proposed judgment. This amended judgment made two changes in appellees' original proposal: (1) its scope was broadened to cover all bakery products, not only bread and rolls; and (2) the prohibition against allocating business and rigging bids on sales to naval installations in the Jacksonville area was extended to all sales to the United States, its agencies or instrumentalities (R. 127–129). Subsequently, at the hearing on the show cause order, appellees agreed to increase the period during which they would be required to submit sworn statements of non-collusion from three to five years (R. 112, 115).

The government filed a second brief opposing entry of the proposed amended judgment. The government contended that that judgment was still inadequate because (1) the prohibition against conspiring to fix prices of bakery products covered only sales to the federal government; and (2) there was no injunction against the appellees "urging or suggesting to any seller of bakery products the quotation or charging

of any price or other terms or conditions of sale of bakery products."[1] In these circumstances, the government urged that the court could not terminate the case by entry of judgment without either the government's consent or a trial of the merits (R. 120–124).

The district court entered appellees' proposed amended judgment, which recited that it was entered "without trial or adjudication of any of the issues of fact or law herein and before the taking of any testimony" (R. 129). The court held that "[b]ased upon this court's knowledge of the facts involved in Case No. 11677-Crim-J [see n. 1, *supra*] and this record, the proposed judgment which the court is entering provides all the relief to which the plaintiff would be entitled after the entry of a decree pro confesso against each defendant and after a trial on the allegations of this complaint"; and that the judgment "appears to provide the plaintiff with every safeguard needful to accomplish the prevention and restraint of the violations of the Sherman Act as set forth in the complaint * * *" (R. 128). The court stated (R. 128) that the government's "demand [for] * * * the two controversial provisions * * * does not have a reasonable basis under the circumstances here present" and constituted "arbitrary and unauthorized conduct in view of the intent of Congress to encourage consent decrees pursuant to Section 5 of the Clayton Act * * *."

[1] The government agreed to a modification of this proposed provision to permit the appellees to print the suggested retail price of their products on the package (R. 60).

SUMMARY OF ARGUMENT

The district court erred in terminating the government's civil antitrust case prior to trial and over the government's objection by entering a judgment containing less relief than the government was seeking. The nature of antitrust litigation is such that a district court cannot in normal course determine the scope of appropriate relief without hearing evidence on the particular facts of the violation and the circumstances relevant to an appropriate remedy. In the present case, in particular, the district court had no adequate basis for concluding that the United States would not be entitled to the relief it sought after trial. The government made clear to the court that it was seeking at least two provisions not covered by the proposed judgment: one prohibiting price-fixing with regard to sales to third parties and the other forbidding certain attempts to set the price on resale of the defendants' bakery products. There was no justification for concluding, prior to trial, that the other provisions were adequate or that the additional items could not be found warranted upon trial of the allegations of the complaint.

Although the district court's opinion suggests that the court drew upon knowledge, from pretrial and other proceedings, of what the evidence would in fact show, that is not an adequate basis for denying a party the opportunity to show additional facts or to disprove the initial impressions of the judge trying the case. Nor can the judgment below be sustained on the ground, vigorously argued by the defendants below, that no evidence admissible on the issues of violation or relief under the allegations of the com-

plaint could warrant the relief sought. It is plain that the government could in fact justify the relief it sought under the allegations of the complaint. Finally, the judgment below cannot be sustained as a legitimate sanction for and consequence of the failure of the United States to reveal to the court the specific nature of the evidence which would sustain the relief it sought, for the record and the district court's opinion both show that the court never ordered the United States to make such a showing and did not base its judgment in any way upon a failure to comply with such an order. Moreover, there is grave doubt as to whether the district court would have authority to enter such an order as part of a pretrial hearing under Rule 16 of the Federal Rules of Civil Procedure.

Finally, Section 5 of the Clayton Act, which provides that consent decrees shall not constitute *prima facie* evidence in a later damage action, does not justify the action of the district court in this case. That provision was added to save the government needless expense by encouraging defendants to enter into consent decrees prior to trial. It was never intended to superimpose judicial control on the processes of free negotiation between the parties, which have always been recognized as the only appropriate mechanism for settlement of litigation prior to trial. *Swift & Co.* v. *United States*, 276 U.S. 311, 331–332.

ARGUMENT

THE DISTRICT COURT IMPROPERLY TERMINATED THIS ANTITRUST CASE BY ENTERING THE JUDGMENT PROPOSED BY THE APPELLEES, PRIOR TO TRIAL AND OVER THE GOVERNMENT'S OBJECTION

INTRODUCTION

In this case the district court, "without trial or adjudication of any of the issues of fact or law herein" (R. 129), terminated a government civil antitrust case over the government's objection by entering a judgment proposed by the appellees which did not contain two provisions that the government deemed necessary if the case were to be settled instead of proceeding to trial. The court did so because it concluded, on the basis of its "knowledge of the facts involved" in the related criminal case charging the same offense (in which the appellees had pleaded *nolo contendere*) and on "this record," that such judgment "provides all the relief to which the plaintiff would be entitled * * * after a trial on the allegations of this complaint" (R. 128).

There is nothing in the Federal Rules of Civil Procedure which permits such an extraordinary result of an antitrust case. The Rules provide a procedure for testing whether *any* relief could be granted: a pretrial motion under Rule 12(b)(6) to dismiss the complaint on the ground that, even if all the allegations in the complaint were established, the plaintiff would still be entitled to no relief. But if the complaint states a cause of action upon which some relief can be granted, the case can normally terminate

only in one of two ways: (1) by a decree to which both parties consent; or (2) by an adjudication of the merits based upon a trial or the defendant's admission of the allegations of the complaint.

Consent decrees are an important weapon in the administration of the antitrust laws. Such a disposition may save large expenditures of time, energy and funds, including the time and energy of the courts. The possible savings are often a factor in determining what relief, by way of consent decree, the government may accept.

The responsibility for consent decree negotiations is vested solely in the Attorney General, and his decision to offer, accept or reject any particular terms of settlement is not open for judicial review. Pretrial proceedings in a district court may be used to prevent waste of the court's time or abuse of its process, but they carry no license to review consent decree negotiations in antitrust cases and then pass judgment upon the correctness or even the reasonableness of the government's position. It was entering upon the latter course, we fear, that led the district judge into error in the present case; and it was the danger that such a course would become real that led the government to take this appeal. Nor is this solely a matter of keeping separate the respective functions of the executive and the courts. Any use of inconclusive negotiations for consent decrees as a basis for entering decrees without trial and without consent would quickly tend to inhibit negotiations in future cases. A decree that is suitable as a means of saving time, effort and expense in the preparation

of a case may be utterly inadequate after they are expended.

Not only is the suitability of particular relief dependent upon whether and when there is consent, but the appropriate scope of the relief may also depend upon whether there is an admission or adjudication of guilt. The admission or adjudication of an antitrust violation is often an effective sanction which operates as part of the remedy and bears upon the sufficiency of other relief.

We do not urge that a district court may never conclude, prior to trial and without hearing evidence, that the relief the complainant seeks over and above the consent judgment offered by the defendant is so foreign to any remedy that might conceivably be justified under the evidence that the complainant says he will offer as to enable the court to say that nothing could be developed under the offer which could possibly justify the additional relief. Such a case might arise, to cite a clear example, if the government were foolishly to request an injunction ordering the defendant to bargain collectively with the representatives of its employees as part of the remedy for a conspiracy to divide marketing territory. We assume that if a defendant was willing to accede to a decree containing the only relief to which the complainant could conceivably be found entitled upon the most optimistic development of its intended proof, including an admission or adjudication of past violations, then the district court might properly enter the decree without wasting its time in hearing the evidence.

It is also unnecessary to consider, in the present case, the soundness of our view that the government is always entitled to an adjudication or admission of past violations as part of the relief. Here the government was denied more than an adjudication of the alleged violations. The district court denied, without a trial, two important items of preventative relief. Nor is the case one in which it could be said as a matter of law that the government could not possibly be entitled to the disputed provisions even if it prevailed on the merits and showed that extensive violations had resulted from a virulent disposition to engage in restraints of trade. On the contrary, it is plain that the evidence which the government proposed to introduce with respect to the character of the past violations and the need for relief could amply justify a court in granting the disputed provisions. At this preliminary stage of the case and without knowing any of the detailed facts, the district court had no adequate basis for concluding that the relief proposed by the appellees would "provide the plaintiff with every safeguard needful to accomplish the prevention and restraint of the violations of the Sherman Act as set forth in the complaint" and therefore was all the government could obtain "after a trial on the allegations of this complaint" (R. 128).

A. JUDICIAL DETERMINATION OF THE SCOPE OF ADEQUATE INJUNCTIVE RELIEF IN AN ANTITRUST CASE REQUIRES FULL DEVELOPMENT OF THE NATURE AND EXTENT OF THE VIOLATIONS

"A full exploration of facts is usually necessary in order properly to draw * * * a decree [in an

antitrust case]" (*Associated Press* v. *United States*, 326 U.S. 1, 22). Thus, the very nature of the inquiry required for determining the scope of proper relief in an antitrust case bars a district court from attempting to exercise its discretion unless and until all the facts have been fully developed. Prior to trial the district court has before it none of the facts necessary for this determination.

The court must identify the "illegal conduct" before it can determine how to "cure the ill effects" thereof, and prevent "its continuance" (*United States* v. *United States Gypsum Co.*, 340 U.S. 76, 88). This evidence is fully developed in the course of trial of the merits of the violations charged in the complaint. It can only be hypothesized and very roughly approximated prior to trial. Further, in formulating appropriate injunctive relief, the court often hears evidence that goes beyond what would be needed to establish violations of law, and may conduct a separate hearing on relief.[8] It will seek to determine the means by which the violations were committed and will explore related practices. As this Court has stressed, "relief, to be effective, must go beyond the narrow limits of the proven violation" (*United States* v. *United States Gypsum Co.*, 340 U.S. at 90), and may prohibit "otherwise permissible practices connected with the acts found to be illegal" (*United States* v. *Loew's, Inc.*, 371 U.S. 38, 53). The nature of such evidence bearing on appropriate relief cannot be discovered merely from the pleadings. The proper

[8] See *United States* v. *du Pont & Co.*, 353 U.S., 586, 607; *United States* v. *United States Gypsum Co.*, 340 U.S. 76, 85.

scope of an equity decree intended to prevent future wrongdoing generally depends upon such factors as the history, development and extent of the wrongdoing; its duration and intensity; whether it was an isolated infraction or part of a larger scheme; the responsibilities of the individuals involved—whether the wrongdoing was company policy formulated or approved by the highest executives or independent misconduct of subordinates; and the state of competition in the industry. This range of relevant matters cannot be effectively enclosed in the district court's speculations as to what evidence might be forthcoming under the allegations of the complaint. To support an antitrust decree, absent consent of the parties, the court must make and file findings on the material facts, which "constitute the grounds of its action" (Rule 52(a)).[4]

Beyond this, a district court in antitrust litigation has "a wide range of discretion * * * to mould the decree to the exigencies of the particular case"

[4] Judicial findings under Rule 52(a) are not required for a consent decree because the parties' consent estops them from appealing and relieves the court "of the very necessity of making a supporting record. A decree rendered by consent 'is always affirmed, without considering the merits of the cause.'" *National Labor Relations Board* v. *Ochoa Fertilizer Corp.*, 368 U.S. 318, 323; *Swift & Co.* v. *United States*, 276 U.S. 311. Therefore, judicial entry of a consent decree is limited to the precise terms of the parties' agreement (see *Swift & Co.* v. *United States*, 276 U.S. at 315; *Sawyer* v. *Mid-Continent Petroleum Corp.*, 236 F. 2d 518 (C.A. 10); *In re Clark*, 176 Fed. 955 (N.D.N.Y.); *United States* v. *Hartford-Empire Co.*, 1 F.R.D. 424, 427 (N.D. Ohio)). Any judicial modification of a consent decree, over the objection of a party, requires "a hearing that included evidence and a judicial determination based on it" (*Hughes* v. *United States*, 342 U.S. 353, 357, 358).

(*United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 185). That discretion cannot be wisely exercised on the basis of hypothetical abstractions. The events and actors must be made to live again before the court can visualize the conspiracy in its full significance. For example, appraisal of the company's "proclivity for unlawful conduct," a factor highly relevant to the breadth of relief (*United States* v. *Paramount Pictures*, 334 U.S. 131, 148), may require inferences about the virulence of the conspiracy and the character and motives of the individuals involved—inferences which depend upon seeing and hearing witnesses. *Arguendo* assumptions on such matters are not a substitute for factual evidence.[8]

These reasons led the district court, in *United States* v. *Hartford-Empire Co.*, 1 F.R.D. 424, 427 (N.D. Ohio), to reject an attempt by defendants, similar to the effort here, to have the court terminate an antitrust case before trial by entering "consent" judgments to which the government had not consented. The court pointed out (p. 429):

> * * * The court does not now know and cannot pre-judge what the testimony in this case

[8] Findings of fact on these issues are also an essential aid to the appellate court in reviewing an equity decree in an antitrust case. "The relief granted by a trial court in an antitrust case * * * has always had the most careful scrutiny of this Court" (*International Boxing Club* v. *United States*, 358 U.S. 242, 253), and findings on the evidence are essential for the Court to fulfill its "duty to examine the decree in light of the record to see that the relief it affords is adequate to prevent the recurrence of the illegality which brought on the given litigation" (*United States* v. *Loew's, Inc.*, 371 U.S. 38, 52). See also, *Schine Theatres* v. *United States*, 334 U.S .110, 125.

> will disclose; therefore, he cannot anticipate what form of relief he would deem to be wise, expedient, and necessary to be entered into a decree, if it be found that some or all or substantially all of the allegations of the complaint are sustained. Hence the court cannot now say that the proposed decree would satisfy everything requested in the prayer. * * *
>
> * * * Until the record contains facts upon which conclusions may be based, the court feels that he would do wrong and commit error to anticipate facts and approve one or all of the proposed decrees at this time.

The court also stated (p. 427) that even assuming that the injunctive provisions proposed in one of the decrees "would be all that might be deemed necessary after the facts have been submitted, is the court actually now in a position to so determine and prejudge? * * * I am of the opinion that an impossible situation would be reached by sustaining and signing such a proposed decree in anticipation of what the facts may be."[*]

The adequacy of relief is thus a matter which can properly be decided only upon the facts, beginning with detailed evidence of the nature and extent of the conspiracy. To be sure, a district court may strike from the complaint a particular prayer for relief, if not authorized as a matter of law (*e.g., Clay*

[*] For similar reasons, in the pretrial stage of *United States* v. *Loew's, Inc.*, 189 F. Supp. 373 (S.D.N.Y.), reversed in part, 371 U.S. 38, when defendants sought a resolution of issues pertinent to relief and requested a separate and preliminary trial to that end, the district judge denied the request, stating that he was "unable to dispose of the issue of the relief demanded in the absence of proof as to the facts" (189 F. Supp. at 377).

v. *Calloway*, 177 F. 2d 741 (C.A. 5)). But the kind of inquiry sufficient to determine whether requests for particular relief should be stricken is not sufficient to enable the tribunal to decide affirmatively in advance of trial what form of decree will be adequate to remedy the violations charged.[1] Nor, it is important to note, can this gap in the court's knowledge be filled by reference to the relief requested by the United States for settlement of the case. To avoid the risks and burdens of trial the government may be willing to accept a consent decree granting less relief than it believes would be warranted by the facts which could be proved at trial. The government's statement of the terms upon which it is willing to settle a case thus cannot be equated with the relief which it would deem adequate after trial. There is, in short, no substitute for a full determination of the relevant facts if

[1] For this reason a recent antitrust decision, relied upon below, *United States* v. *Brunswick-Balke-Collender Co.*, 203 F. Supp. 657 (E.D. Wis.), is sharply distinguishable from the present case. The district court there entered a judgment containing all the injunctive relief sought by the government during consent decree negotiations. It ruled, as a matter of law, that the government was not entitled to an item of non-injunctive relief it sought (a provision that the decree would have prima facie effect in certain private cases). The district court assumed, we believe erroneously, that the government had conceded that no injunctive relief beyond that demanded for a consent decree would be appropriate after trial. In contrast, in this case, there is plain disagreement on the scope of the injunction.

Contrary to *Brunswick*, we believe that the government is entitled to an adjudication of alleged antitrust violations as a means of enforcement of the antitrust laws. See *United States* v. *Parke, Davis & Co.*, 365 U.S. 125, and the government's Jurisdictional Statement, and Brief in Opposition to Motion to Dismiss or Affirm in that case, No. 526, O.T. 1960.

a district court is effectively to exercise its discretion to determine the proper scope of relief in an antitrust case.[8]

B. IN THE PRESENT CASE THE DISTRICT COURT HAD NO BASIS FOR CONCLUDING THAT THE UNITED STATES WOULD NOT BE ENTITLED TO THE RELIEF IT SOUGHT AFTER TRIAL

1. The court below rested its decision on two grounds: *first*, that the government's demand for the additional provisions "does not have a reasonable basis under the circumstances here present" (R. 128); and *second*, that, without the additional provisions, the judgment provides "all the relief to which the plaintiff would be entitled * * * after a trial on the allegations of the complaint," a conclusion stated to be "[b]ased upon this court's knowledge of the facts involved in Case No. 11677-Crim-J and this record" (R. 128). Although the court's statement suggests that its decision was based, both on the insufficiency of the government's allegations to justify further relief, and upon the court's knowledge of what the government would in fact be able to prove to the satisfaction of the court, we believe that only the former ground warrants extended discussion. There can be no doubt that the district court was without power to find the facts on the basis of personal knowledge and without permitting the government to introduce evidence. It is equally clear that the district court was without power to determine the scope of appropriate relief without finding the facts or permitting trial of the

[8] It is hardly necessary to add that any use of the terms of the government's proposed consent decree to limit the government's demands for relief after trial would severely interfere with the course of negotiations for a consent decree.

factual issues merely because it had reached *a priori* conclusions as to what the facts would ultimately show.' We shall therefore discuss at length only the question whether the district court could properly conclude that, as a matter of law, the government could not be entitled to the additional relief it sought after a trial of the allegations of its complaint.

2. The government's prayer for relief asked for certain specific provisions covered by the judgment entered by the court, plus such additional relief as the facts developed at trial would warrant. In the course of pre-trial proceedings the government made clear to the court that this additional relief would include at least two provisions not in defendants' proposed judgment—one prohibiting price-fixing with regard to sales to third parties and the other enjoining the appellees from "[u]rging or suggesting to any seller of bakery products the quotation or charg-

'The pretrial proceedings here involved settlement of the False Claims Act count, various motions of appellees addressed to the pleadings, and the defendants' motions for entry of judgment which arose from the unsuccessful consent decree negotiations. In the course of these events, the court below heard various contentions and representations of counsel concerning the case. Nothing in these discussions provides any foundation for the court's belief that it had "knowledge of the facts involved" and could make a factual appraisal of "the circumstances here present" (R. 128). The same is of course true of the discussions with counsel in the prior criminal case in which defendants pleaded *nolo* to charges of rigging of bids and allocation of business on the government sales involved in the complaint here, see fn. 1, *supra*, p. 4. It is noteworthy that, while ruling that the government was "arbitrary" in requesting relief against price-fixing to the general public, the judge did not refer to the second prior criminal case over which he presided (see p. 4, *supra*), in which defendants pleaded *nolo* to price-fixing on sales to non-government accounts.

ing of any price or other terms or conditions of sale of bakery products" (R. 74–75). We submit that the government was entitled to proceed to trial to obtain these items of relief if the evidence it could offer under the complaint, either on the issue of liability or on the issue of relief, could justify the district court in granting the relief sought. There can be no real question that the government's complaint was broad enough to permit offering such evidence in the instant case.

The government's complaint alleged that, over a four-year period, the defendants had conspired and acted "[t]o submit noncompetitive, collusive, and rigged bids and price quotations for supplying bakery products to United States Naval installations in the Jacksonville area" (R. 7). The means adopted were alleged to include the following (R. 4):

> Representatives of the defendants held meetings and conferred by telephone for the purpose of allocating among the defendants the business of supplying bakery products to United States Naval installations in the Jacksonville area. The business was allocated in such a manner as to provide each defendant with the business for a designated quarterly period of the year. When invitations to bid were received from the Naval installations in the Jacksonville area, said representatives would again meet and confer and the representatives of the defendant designated for the particular period would declare the prices which that defendant intended to bid. The others would agree to bid higher prices and thus protect the bid of the designated low bidder.

All the injunctive provisions involved in this case are within the general scope of permissible relief against the violations alleged in the complaint. Thus, while the complaint charged rigging of bids only on sales of bread and rolls to naval installations in Jacksonville, appellees agreed to accept a prohibition against rigging of bids on sales of any bakery products to any federal agencies anywhere in the country. Such an injunction might have been found appropriate by the district court after trial, if it appeared, for example, that the alleged conspiracy had been authorized or participated in by high-level management in charge of sales throughout the country.

In the same way, the facts concerning the alleged violations might have been found to support the government's right to the disputed clauses—an injunction against allocating business and fixing prices on sales to non-government customers, and against urging or suggesting resale prices. It may appear, for example, that the government bids bore a fixed relation to the level of prices on sales to non-government customers or to the level of retail prices, or that the management personnel of the appellees who authorized or participated in the bid-rigging conspiracy had responsibility for all other sales as well. The additional provisions sought by the government might well turn out to be necessary to assure the public freedom from the continuance of similar illegal conduct in other markets under the supervision of that management. Cf. *United States* v. *United States Gypsum Co.*, 340 U.S. at 88. "It is a salutary principle that when one has been found to have committed acts in violation of a

law he may be restrained from committing other related unlawful acts" (*National Labor Relations Board* v. *Express Pub. Co.*, 312 U.S. 426, 436).

Even if the facts proved in order to establish the violation charged were not themselves sufficient to justify all the relief sought by the government, the proof of violation might make appropriate further evidence bearing on the scope of relief. Thus, for example, four of the five defendants had in fact been adjudged guilty of price-fixing to nongovernment accounts as well as of bid-rigging on government sales, *supra*, p. 4.[10] Similarly, any evidence of violations by the same defendants in other parts of the country or of violations involving the maintenance of resale prices would be relevant on the issue of relief even if not admissible on the issue of violation.

In short, the district court could not have properly ruled that no evidence which the government might have introduced could possibly justify the two provisions at issue. The court, of course, might conclude after trial that the provisions were unnecessary, but that determination would represent an informed exercise of judicial discretion, based upon all the facts of the case. But the court had no basis for making the determination, at this preliminary stage of the case, that the judgment provided the government "with every safeguard needful to accomplish the prevention and restraint of the violations of the Sherman

[10] The government did not file and does not intend to file an additional suit for injunctive relief against the four appellees convicted in the nongovernment case. We therefore regard the final injunction to be entered in this suit as the appropriate vehicle for any injunctive relief intended to prevent a repetition of that offense.

Act as set forth in the complaint" and that "the proposed judgment which the court is entering provides all the relief to which the plaintiff would be entitled after the entry of a decree pro confesso against each defendant and after a trial on the allegations of this complaint" (R. 128).

3. Appellees contend (Motion to Affirm, pp. 6–12), however, that the district court was justified in entering their proposed judgment because of the failure of the United States to tender either evidence or more specific allegations in response to the order to show cause why it should not be entered. The short answer is that the district court never directed the United States to make additional and more specific allegations to supplement an already adequate complaint. It never requested the United States to detail or tender whatever evidence the government proposed to enter supporting its charges. Rather, it directed the government to respond to the defendants' contentions, made increasingly explicit during the pretrial proceedings, that no evidence introduced at trial could possibly warrant the relief the government was seeking.

Thus, the defendants argued in their amended motion for entry of judgment that "if the court granted injunctive relief of a greater scope that that set forth in the proposed judgment, such relief would not have a constitutional or statutory basis in this action" (R. 56). They stated on oral argument (R. 100–101):

> Then after the defendants received the brief and the statement of objections, we sat down

> and honestly tried to figure out what the broadest possible injunction was that the Court would be able to grant on the cases if Mr. Stuckey [government counsel] was able to prove everything he alleged in his complaint and bring in all evidence on the relief which would in any way be admissible in this state of the pleadings and under the case as it's filed before Your Honor.

They bottomed their demands for a judgment denying the government part of the relief it sought squarely on the legal proposition that "we have, in this amended judgment, given the relief which the furthest relief or the broadest circle of relief that the Court could grant at a trial of this case" (R. 96).

The government responded to these legal contentions by arguing, *inter alia*, that relief in addition to that agreed to by the defendants, including the specific provisions demanded by the government, could be warranted by the district court's findings after trial of the issues posed by the complaint and answer, (R. 90–92, 122–124). This response raised a legal issue identical to that discussed under Point B(2), *supra*, pp. 20–24. At no time during the pretrial proceedings, including the hearings at which he discussed with the parties at some length the nature of the issues before him, did the district judge directly and specifically request the government to describe in greater detail the factual basis for the relief it sought.

Although the defendants occasionally made the argument that "If the Government had admissable [sic] evidence going beyond the facts plead showing a legal need for broader relief, then it should have

set this out specifically in answer to the rule nisi" (R. 122; see also R. 106–107), this argument could not convert the legal issues posed by the Order to Show Cause into a wholly unstated order to make discovery of all the evidence on which the government intended to rely. That the government was correct that it "was under no duty to reveal all of its evidence in answer to the rule nisi" (R. 123) is evident from the district court's opinion. For the court's opinion, like its oral discussion at the pretrial hearing, never so much as mentions the alleged failure of the United States to obey an implied discovery order of the court. It is based solely on the court's own knowledge of the facts plus the defendants' legal arguments that the complaint was insufficient to sustain broader relief than that to which they had consented. The court held simply that the defendants' proposed judgment would "provide the plaintiff with every safeguard needful to accomplish the prevention and restraint of the violations of the Sherman Act as set forth in the complaint" and would provide "all the relief to which the plaintiff would be entitled • • • after a trial on the allegations of this complaint" (R. 128).

Moreover, it is extremely doubtful whether a pretrial order having the effect suggested by the appellees would have been justified here at all. Pretrial conferences under Rule 16 play a valuable role in developing and setting forth areas of agreement between the parties, thus narrowing and defining the contested issues for trial and facilitating proof at trial. But Rule 16 "calls for a *conference* of counsel with the

court to *prepare* for, not to avert, trial" (*Padovani* v. *Bruchhausen*, 293 F. 2d 546, 548 (C.A. 2), emphasis in original); "pre-trial proceedings are intended to determine what the issues are, and not to invade the trial function of resolving those issues" (*Reynolds Metals Co.* v. *Metals Disintegrating Co.*, 176 F. 2d 90, 92 (C.A. 3); see *Lynn* v. *Smith*, 281 F. 2d 501, 506 (C.A. 3); *Clay* v. *Callaway*, 177 F. 2d 741, 743 (C.A. 5); *Seminar on Protracted Cases*, 23 F.R.D. 319, 509–510).

Where a district court is faced with triable issues, summary disposition of the case is improper. The court is precluded from deciding factual issues on counsel's pretrial representations, instead of on the evidence at trial. (*Wirtz* v. *Young Electric Sign Co.*, 315 F. 2d 326 (C.A. 10); *Lynn* v. *Smith*, 281 F. 2d 501 (C.A. 3); *Clay* v. *Callaway*, 177 F. 2d 741 (C.A. 5)). It may not turn pretrial into "a substitute" for trial, and seek to develop the facts at pretrial by hearing witnesses (*Lynn* v. *Smith*, 281 F. 2d at 504, 507). And it may not terminate a case because of its hypothetical view as to the conclusion it would reach on disputed issues after trial of the case (*Lynn* v. *Smith*, *supra*; *Wirtz* v. *Young Electric Sign Co.*, 315 F. 2d at 328). Failure to comply with a proper pretrial order directing disclosure of a party's legal theory or underlying evidence may, in an appropriate case, justify dismissal of the case or disciplining of the counsel responsible;[11] but it would not support the judicial reso-

[11] See the discussion of the court's disciplinary powers in *Gamble* v. *Pope & Talbot, Inc.*, 307 F. 2d 729 (C.A. 3). The limits upon the court's authority to compel disclosure are indicated in *Padovani* v. *Bruchhausen*, 293 F. 2d 546 (C.A. 2),

lution of contested issues undertaken by the court in this case.

Finally, requiring the government to produce at a pre-trial hearing evidence to justify the relief it seeks would not be an appropriate procedure. As we have shown, judicial determination of what relief is necessary ordinarily requires complete knowledge of the detailed facts of the case. For the court to attempt to ascertain such facts at a pre-trial hearing on relief would turn such hearing into virtually a full-scale trial of the merits. Mere generalized statements by government counsel of what the evidence would show, or even relatively detailed offers of proof, would not give the court a sufficient factual basis to permit the kind of informed judgment upon which the formulation of relief depends. For such a judgment requires the drawing of subtle inferences from all of the facts surrounding the violation, and there is no effective substitute for a trial as the means of developing the facts.

C. SECTION 5 OF THE CLAYTON ACT DOES NOT SUPPORT THE DISTRICT COURT'S ACTION IN TERMINATING THE CASE WITHOUT TRIAL BY ENTRY OF A JUDGMENT TO WHICH THE GOVERNMENT DID NOT CONSENT

The court below also ruled that the government's insistence upon its own form of injunction as a condition of settlement was "arbitrary and unauthorized

in which the Second Circuit by mandamus set aside a preclusion order entered after the district court had required plaintiff to tender successive detailed statements of factual and legal contentions. The court of appeals ruled that "to force a plaintiff against his will to limit his case beyond the issues he has tendered in his complaint is contrary to the basic principles of the federal rules" (293 F. 2d at 550).

conduct in view of the intent of Congress to encourage consent decrees pursuant to Section 5 of the Clayton Act and thus avoid a costly and protracted trial for the parties" (R. 128). But there is nothing in the language, legislative history, or basic policy of Section 5 which in any way suggests that it was intended to limit the Attorney General's broad discretion to determine the kind of final injunction that the government will accept without a trial.

Section 5, 15 U.S.C. 16, provides that a "final judgment or decree" in a government antitrust suit "to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant" in a subsequent damage action, subject to the following proviso:

> *Provided*, that this section shall not apply to consent judgments or decrees entered before any testimony has been taken * * *.

The main purpose of Section 5 was to aid treble-damage *plaintiffs* "by making available to them all matters previously established by the Government in antitrust actions" (*Emich Motors* v. *General Motors*, 340 U.S. 558, 568, see 51 Cong. Rec. 13851). The quoted proviso was added to save the government needless litigation expense by encouraging defendants to enter into consent decrees before trial (S. Doc. 584, 63d Cong., 2d Sess., p. 6; 51 Cong. Rec. 15638, 15825, 16276).[12]

[12] The purpose of Congress to exclude even a consenting defendant from the benefits of the Section 5 proviso where the defendant chooses to put the government to its proof is demonstrated by the express requirement that the consent judgment be "entered before any testimony has been taken." It is further

While Section 5 encourages "consent judgments," Congress did not give to any defendant the legally enforceable right to demand a particular form of consent decree prior to trial. The availability and adequacy of a consent judgment was left to the normal process of negotiation and agreement between the parties, subject to judicial approval. A court may, of course, reject a proffered consent judgment, but it cannot impose upon either party a final "consent" judgment granting relief intended to remedy antitrust violations without adjudicating the nature and extent of the violations. Far from restricting the Attorney General's discretion as to settlements, the reference to "consent judgments or decrees" in Section 5 merely shows that "Congress indirectly has recognized the Attorney General's authority to utilize consent settlements to terminate antitrust litigation" (Subcommittee No. 5, House Committee on the Judiciary, 86th Cong., 1st Sess., *The Consent Decree Program of the Department of Justice*, p. 1 (Comm. Print, 1959)).[12]

The Attorney General's broad authority in negotiating settlements was explicitly upheld in *Swift & Co.* v. *United States*, 276 U.S. 311. In that case, the Court

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emphasized by the terms of Section 5, as originally enacted in 1914 (38 Stat. 731). That Act contained a second proviso, applicable to cases then pending, which made the stated prima facie effect inapplicable to consent judgments in pending suits, in which the taking of testimony had been commenced but not concluded, only if the decree were entered "before any further testimony is taken."

[12] At the time Section 5 was enacted, consent decrees had been entered in approximately 12 cases, beginning with the 1906 decree in *United States* v. *Otis Elevator Co.*, 1 Decrees & Judgments 106 (N.D. Cal., 1906).

rejected the contention that an antitrust consent decree was void "because the Attorney General had no power to agree" to a judgment which prohibited the defendants from doing acts which themselves were not illegal. The Court stated (pp. 331–332): "[W]e do not find in the statutes defining the powers and duties of the Attorney General any such limitation on the exercise of his discretion as this contention involves. His authority to make determinations includes the power to make erroneous decisions as well as correct ones." The discretion of the Attorney General, as the government's chief law officer, to agree to particular terms in a consent judgment is no less than his discretion to refuse to settle a particular case, except upon the terms he chooses. It is not for a district court to consider whether the Attorney General has made an "erroneous decision" in insisting upon certain terms of settlement. It cannot substitute its discretion for that of the Attorney General as to the appropriate basis for settlement.

The considerations which may properly influence the government in settling an antitrust case are particularly inappropriate for judicial scrutiny. There is necessarily much give and take on both sides, and the resulting compromise depends on a number of factors.[14] The government's primary concern is with

[14] Because of this, the Court has always rejected attempts to utilize the terms of consent decrees as legal precedent: "the circumstances surrounding such negotiated agreements are so different that they cannot be persuasively cited in a litigation context." *United States* v. *du Pont & Co.*, 366 U.S. 316, 330 fn. 12. Defendants in *du Pont* were arguing that in other cases the government had accepted consent decrees with less stringent

the effectiveness of the decree, but it must also weigh the importance of the case, the strengths and weaknesses of the evidence, the likelihood of success both on the merits and in obtaining all of the relief deemed appropriate, and the importance of obtaining an adjudication of the violations charged. Moreover, in recent years, more than 75 percent of all civil antitrust suits brought by the government have been terminated by consent judgments [11] and proper utilization of the government's limited resources is an important factor. The government may, therefore, abandon or modify particular items of relief which it would seek if the case went to trial and it prevailed, solely in order to reach a settlement of the case.

Similarly, from the defendant's side, the acceptability of a settlement involves evaluating various restrictions in the light of the uncertainties and costs of litigation, business exigencies, and other circumstances. There is no compulsion upon a defendant to accept a consent decree proposed by the Attorney General except that provided by the circumstances of the antitrust violations in question. The defendant may in the course of pretrial negotiations obtain the benefit of a narrower injunction than the government might obtain after undertaking the burden of a trial.

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relief than sought against them. The Court's comment indicates recognition, therefore, that the government may settle for less than would be sought after trial, and awarded by a court.

[11] Subcommittee No. 5, House Committee on the Judiciary, 86th Cong., 1st Sess., *The Consent Decree Program of the Department of Justice*, p. 7 (Comm. Print., 1959).

The defendant may also choose to submit to a broad injunction before trial in order to protect itself from the prima facie effect in treble-damage suits which would result under Section 5 from an adjudication of guilt. There may be business reasons for it to avoid the delays and notoriety of a trial. But the proviso in Section 5 does not give a defendant the double privilege of rejecting a pretrial consent judgment proffered by the government and at the same time avoiding an adjudication on the merits of the government's complaint.[16] At most, Section 5 is simply an inducement to defendants to negotiate a pretrial settlement of the suit. If an antitrust defendant regards the government's settlement terms as unreasonable, his remedy, like that of any other litigant who cannot agree upon settlement with his adversary, is to reject the proposal and go to trial.

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[16] Appellees' counsel sought just this privilege in the court below:

"The COURT: Let me say this now: That I'm going to enter your Decree, or the Government's Decree, one, see? I'm going to enter a Decree here. I'm not just going to enter an Order after this thirty days expires, saying that we'd better go on to trial.

"Isn't that understood?

"Mr. DUNLAP [Defense counsel]: No, sir.

"Mr. STUCKEY [government counsel]: No, sir.

"The COURT: It isn't?

Mr. DUNLAP: No, sir, because I think we clearly withheld that at the last hearing. * * * That was the last thing I said and I believe one of the first things we said, that we did not agree that we were foreclosed from a right to go to trial if you decided to enter the Government's Decree" (R. 116–117).

CONCLUSION

For these reasons, the judgment below should be vacated and the case remanded for trial.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.
WILLIAM H. ORRICK,
Assistant Attorney General.
PHILIP B. HEYMANN,
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LIONEL KESTENBAUM,
PATRICK M. RYAN,
Attorneys.

SEPTEMBER 1963.

APPENDIX

United States District Court, Southern District of Florida, Jacksonville Division

CRIMINAL No. 11676J

UNITED STATES OF AMERICA, PLAINTIFF

v.

AMERICAN BAKERIES COMPANY, FLOWERS BAKING COMPANY, INC., FUCHS BAKING CO., HOLSUM BAKERS, INC., SOUTHERN BAKERIES COMPANY, AND WARD BAKING COMPANY, DEFENDANTS

Filed: March 6, 1961

INDICTMENT

The Grand Jury Charges:

I. *Definition of Terms*

1. As used herein, the term:

(a) "Bakery Products" means bread and rolls.

(b) "Florida area" means the area within (1) the State of Florida, and (2) the Southeastern part of the State of Georgia.

(c) "Wholesale accounts" means those grocery stores, supermarkets, restaurants, hotels and similar large purchasers of bakery products to whom the defendants sell bakery products in the Florida area.

II. *The Defendants*

2. American Bakeries Company (hereinafter called "American") is hereby indicted and made a defend-

ant herein. Said defendant is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in Chicago, Illinois. It owns and operates baking plants in Jacksonville, Orlando and Miami, Florida, and in various other States.

3. Flowers Baking Company, Inc. (hereinafter called "Flowers") is hereby indicted and made a defendant herein. Said defendant is a corporation organized and existing under the laws of the State of Georgia with its principal place of business in Thomasville, Georgia. It owns and operates a baking plant in Thomasville, Georgia and a baking plant in Jacksonville, Florida.

4. Fuchs Baking Co., (hereinafter called "Fuchs") is hereby indicted and made a defendant herein. Said defendant is a corporation organized and existing under the laws of the State of Florida with its principal place of business in Homestead, Florida. It owns and operates a baking plant in Homestead, Florida.

5. Holsum Bakers, Inc., (hereinafter called "Holsum") is hereby indicted and made a defendant herein. Said defendant is a corporation organized and existing under the laws of the State of Florida with its principal place of business in Tampa, Florida. It owns and operates a baking plant in Tampa, Florida.

6. Southern Bakeries Company (hereinafter called "Southern") is hereby indicted and made a defendant herein. Said defendant is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in Atlanta, Georgia. It owns and operates baking plants in Jacksonville, Daytona Beach, Orlando, Tampa, Pensacola and Miami, Florida, and in various other states.

7. Ward Baking Company (hereinafter called "Ward") is hereby indicted and made a defendant herein. Said defendant is a corporation organized and existing under the laws of the State of New York with its principal place of business in New York, New York. It owns and operates a baking plant in Jacksonville and Tampa, Florida, and in various other States.

8. Whenever in this indictment reference is made to any act, deed or transaction on the part of any defendant corporation, such allegation shall be deemed to mean that the directors, officers or agents of such corporation authorized, ordered, or did such act, deed or transaction, for or on behalf of such defendant corporation while actively engaged in the management, direction and control of its affairs.

III. *Nature of Trade and Commerce*

9. The defendants operate the largest bakeries in the Florida area and during the period covered by this indictment said defendants baked approximately 75% of the bakery products sold in said area. In 1959 total sales by the defendants of bakery products in the Florida area amounted to approximately $23,000,000.

10. During the period of time covered by this indictment, the defendants purchased substantial amounts of flour, sugar, yeast and other ingredients used by them in the production of bakery products from suppliers located in States other than Florida. Said ingredients were shipped by said suppliers from their places of business outside Florida to the bakeries of the defendants in the State of Florida.

11. During the period of time covered by this indictment, each of the defendants operated a baking plant in the Florida area. The defendants American,

Ward and Southern owned and operated trucks which regularly and frequently delivered bread from their bakeries in Jacksonville, Florida to wholesale accounts located in the State of Georgia. Thus, there was a regular, continuous and substantial flow of bakery products in interstate commerce between the bakeries of the defendants American, Ward and Southern in Jacksonville, Florida and their wholesale accounts located in Georgia.

IV. *Offense Charged*

12. Beginning in or about April 1960, the exact date being to the Grand Jurors unknown, and continuing thereafter up to and including the date of the return of this indictment, the defendants named herein, together with others to the Grand Jurors unknown, have engaged in a combination and conspiracy in unreasonable restraint of the hereinbefore described trade and commerce in violation of section 1 of the Act of Congress of July 2, 1890, as amended, entitled, "An Act to protect trade and commerce against unlawful restraints and monopolies" (26 Stat. 209, 15 U.S.C. § 1), commonly known as the Sherman Act.

13. The aforesaid combination and conspiracy has consisted of a continuing agreement, understanding, and concert of action among the defendants, and others to the Grand Jurors unknown, the substantial term of which has been that they agree to fix and maintain prices at which bakery products shall be sold to wholesale accounts.

14. During the period of time covered by this indictment, and for the purpose of forming and effectuating the aforesaid combination and conspiracy, the defendants and others to the Grand Jurors unknown, by agreement and concerted action, have done those things which, as hereinbefore alleged, they conspired

and agreed to do. More particularly, on or about April 29, 1960 representatives of the defendants met together and discussed and agreed upon increased prices to be charged for bakery products to be sold by defendants to wholesale accounts.

V. *Effects of the Conspiracy*

15. The effects of the aforesaid combination and conspiracy have been and are that:

(a) Prices for bakery products sold to wholesale accounts have been fixed at uniform and noncompetitive levels;

(b) Price competition among the defendants in the sale of bakery products in the Florida area has been eliminated, and

(c) Wholesale accounts in the Florida area have been deprived of the opportunity to buy bakery products at competitive prices.

VI. *Jurisdiction and Venue*

16. The combination and conspiracy charged in this indictment has been entered into and carried out in part within the Southern District of Florida where the defendants own and operate baking plants. During the period of time covered by this indictment and within the five years next preceding the return thereof, the defendants, pursuant to said combination and

conspiracy, have committed within the Southern District of Florida many of the acts herein charged.

Dated:

A true bill.

(S) Henry M. Stuckey,
HENRY M. STUCKEY,
Attorney, Department of Justice.

(S) ROBERT L. FINCH,
Foreman.

(S) W. WALLACE KIRKPATRICK,
Acting Assistant Attorney General.

(S) CHARLES L. WHITTINGHILL,
Attorney, Department of Justice.

(S) JOHN BRIGGS,
Assistant United States Attorney.

United States District Court, Southern District of Florida, Jacksonville Division

Criminal No. 11677 J

UNITED STATES OF AMERICA, PLAINTIFF

v.

WARD BAKING COMPANY, AMERICAN BAKERIES COMPANY, DERST BAKING COMPANY, FLOWERS BAKING COMPANY, INC., AND SOUTHERN BAKERIES COMPANY, DEFENDANTS

Filed: March 6, 1961

INDICTMENT

The Grand Jury Charges:

I. Definition of Terms

1. As used herein, the term:

(a) "Bakery products" means bread and rolls.

(b) "Jacksonville area" means the area within (1) the Northern part of the State of Florida, and (2) the Southeastern part of the State of Georgia.

II. The Defendants

2. Ward Baking Company (hereinafter called "Ward") is hereby indicted and made a defendant herein. Said defendant is a corporation organized and existing under the laws of the State of New York with its principal place of business in New York, New York. It owns and operates a baking plant in Jacksonville, Florida, and in various other States.

3. American Bakeries Company (hereinafter called "American") is hereby indicted and made a defendant herein. Said defendant is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in Chicago, Illinois. It owns and operates a baking plant in Jacksonville, Florida, and in various other States.

4. Derst Baking Company (hereinafter called "Derst") is hereby indicted and made a defendant herein. Said defendant is a corporation organized and existing under the laws of the State of Georgia with its principal place of business in Savannah, Georgia. It owns and operates a baking plant in Savannah, Georgia.

5. Flowers Baking Company, Inc. (hereinafter called "Flowers") is hereby indicted and made a defendant herein. Said defendant is a corporation organized and existing under the laws of the State of Georgia with its principal place of business in Thomasville, Georgia. It owns and operates a baking plant in Jacksonville, Florida, and a baking plant in Thomasville, Georgia.

6. Southern Bakeries Company (hereinafter called "Southern") is hereby indicted and made a defendant herein. Said defendant is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in Atlanta, Georgia. It owns and operates a baking plant in Jacksonville, Florida, and in various other States.

7. Whenever in this indictment reference is made to any act, deed or transaction on the part of any defendant corporation, such allegation shall be deemed to mean that the directors, officers or agents of such corporation authorized, ordered, or did such act, deed or transaction, for or on behalf of such defendant corporation while actively engaged in the management, direction and control of its affairs.

III. *Nature of Trade and Commerce*

8. The defendants operate the largest bakeries in the Jacksonville area and during the period covered by this indictment, said defendants baked approximately 90% of the bakery products sold in said area. In 1959 total sales by the defendants of bakery products in the Jacksonville area amounted to approximately $11,000,000.

9. During the period of time covered by this indictment, the defendants purchased substantial amounts of flour, sugar, yeast and other ingredients used by them in the production of bakery products from suppliers located in States other than Florida and Georgia. Said ingredients were shipped by said suppliers from their places of business outside Florida and Georgia to the bakeries of the defendants in the States of Florida and Georgia.

10. During the period of time covered by this indictment, each of the defendants operated a baking plant in the Jacksonville area. The defendants

Ward, Southern and American owned and operated trucks which regularly and frequently delivered bread from their bakeries in Jacksonville, Florida to wholesale accounts, including United States Government Naval installations, located in the State of Georgia. Thus, there was a regular, continuous and substantial flow of bakery products in interstate commerce between the bakeries of the defendants Ward, Southern and American in Jacksonville, Florida and their wholesale accounts and United States Government Naval installations located in Georgia.

IV. *Offense Charged*

11. Beginning in or about September 1957, the exact date being to the Grand Jurors unknown, and continuing thereafter up to and including the date of the return of this indictment, the defendants named herein, together with others to the Grand Jurors unknown, have engaged in a combination and conspiracy in unreasonable restraint of the hereinbefore described trade and commerce in violation of Section 1 of the Act of Congress of July 2, 1890, as amended, entitled, "An Act to protect trade and commerce against unlawful restraints and monopolies" (26 Stat. 209, 15 U.S.C. § 1), commonly known as the Sherman Act.

12. The aforesaid combination and conspiracy has consisted of a continuing agreement, understanding, and concert of action among the defendants, and others to the Grand Jurors unknown, the substantial terms of which have been and are:

(a) To allocate among themselves the business of supplying bakery products to Federal Naval installations in the Jacksonville area; and

(b) To submit noncompetitive, collusive, and rigged bids and price quotations for supplying bakery products to Federal Naval installations in the Jacksonville area.

13. During the period of time covered by this indictment, and for the purpose of forming and effectuating the aforesaid combination and conspiracy, the defendants and others to the Grand Jurors unknown, by agreement and concerted action, have done those things which, as hereinbefore alleged, they conspired and agreed to do.

V. *Effects*

14. The effects of the aforesaid combination and conspiracy have been and are that:

(a) Competition among the defendants in the sale and distribution of bakery products to Federal Naval installations in the Jacksonville area has been suppressed and eliminated, and

(b) Federal Naval installations in the Jacksonville area engaged in the purchase of bakery products have been denied the right to receive competitive sealed bids as required by law and have been forced to pay artificially-fixed prices for bakery products.

VI. *Jurisdiction and Venue*

15. The combination and conspiracy charged in this indictment has been entered into and carried out in part within the Southern District of Florida where the defendants, except defendant Derst, own and operate baking plants. During the period of time covered by this indictment and within the five years next preceding the return thereof, the defendants, pursuant to said combination and conspiracy, have

committed within the Southern District of Florida many of the acts herein charged.

Dated:

A true bill.

(S) Henry M. Stuckey,
HENRY M. STUCKEY,
Attorney, Department of Justice.

(S) ROBERT L. FINCH,
Foreman.

(S) W. WALLACE KIRKPATRICK,
Acting Assistant Attorney General.

(S) CHARLES L. WHITTINGHILL,
Attorney, Department of Justice.

(S) JOHN BRIGGS,
Assistant United States Attorney.

U.S. GOVERNMENT PRINTING OFFICE: 1969

No. 101

IN THE

Supreme Court of the United States

OCTOBER TERM 1963

UNITED STATES OF AMERICA,

Appellant,

v.

WARD BAKING COMPANY, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA.

BRIEF FOR APPELLEES.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 101.

UNITED STATES OF AMERICA,

Appellant,

v.

WARD BAKING COMPANY, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA.

BRIEF FOR APPELLEES.

Opinion Below.

The opinion of the district court (R. 125) is not yet reported.

Jurisdiction.

The jurisdictional requisites are sufficiently stated in the Brief for Government.

Statutes Involved.

The statutes involved are sufficiently stated in the Brief for Government.

Questions Presented.

The bakeries (the appellees) filed a motion for entry of a judgment against them providing more extensive injunctive relief than would have been required were the allegations of the complaint proved in their entirety. The district court, as part of its pre-trial procedure, issued an order to show cause why the bakeries' motion for entry of judgment against them should not be granted. The government in response to said order offered neither to amend its complaint, nor to disclose any evidence that would justify more extensive relief than that provided by the proposed judgment, and took the position that "the Government was under no duty to reveal all of its evidence in answer to the rule nisi." The district court thereupon entered its final judgment in the form proposed by the bakeries. Under these circumstances:

I. Did the district court have the power to enter a judgment over the arbitrary objections of the government?

II. Did the district court properly exercise its broad equitable powers and pre-trial procedures by entering as its judgment that which was proposed by the bakeries?

Statement.

On March 6, 1961, a federal grand jury returned to the court below a true bill (R. 21-25) indicting five bakery companies (the appellees) for an alleged combination and conspiracy in unreasonable restraint of trade in violation of Section 1 of the Sherman Act. Thereafter, the bakeries

pleaded *nolo contendere* to the indictment and paid substantial fines as a result thereof.[1]

Subsequently, on July 21, 1961, the government filed in the same court and against the same parties a complaint (R. 1-9) in two counts, which complaint was comprised of substantially the same allegations as those contained in the previous indictment (R. 95). The complaint charged the bakeries with an alleged combination and conspiracy to allocate among themselves the business of supplying bakery products (defined as bread and rolls) to federal naval installations in the Jacksonville area[2], and to submit noncompetitive and rigged bids and price quotations on such business. Count I charged that such conduct violated the False Claims Act (31 U. S. C. 231-233), and sought forfeitures and double damages as provided in that Act (R. 3-6). Count II set forth in considerable detail certain alleged conduct of the bakeries regarding their bidding practices and charged that such conduct violated Section 1 of the Sherman Act, and sought the following relief: (1) an adjudication that the bakeries had violated that Act; and (2) an injunction prohibiting the bakeries from allocating among themselves the business of supplying bakery products to the federal naval installations in the Jacksonville area and submitting noncompetitive and rigged bids and price quotations for such business (R. 6-8). The complaint

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[1] The *nolo contendere* pleas were accepted and fines imposed after a fully reported day-long hearing in open court before District Judge Bryan Simpson. The bakeries take issue with the government's statement that government counsel only briefly discussed the facts involved in the case at the time of said hearing. See Brief for Government, p. 4, n. 1.

[2] The "Jacksonville area" is defined in both the indictment and the complaint as "the area within (1) the northern part of the State of Florida, and (2) the southeastern part of the State of Georgia" (R. 2, 21).

further contained the customary catch-all prayer for general relief and costs (R. 9).

On February 8, 1962, the court below gave notice to all parties that the case was "set for hearing and disposition of all pending matters and preliminary pre-trial conference on March 22, 1962 at 10:00 A. M. with a view to narrowing of issues, limitation of discovery, and other pertinent matters" (R. 136-137). That notice further directed that counsel should attend the hearing prepared to discuss the date for a final pre-trial hearing and the date of trial. This hearing was held.

Prior to May 8, 1962, the parties engaged in extensive settlement negotiations on both Counts I and II (R. 58-60), during which time the parties agreed to dispose of Count I by the bakeries' payment of $44,000.00 (R. 60)[3], without, however, reaching any settlement agreement regarding Count II although the parties had made concessions and submitted alternative proposed judgments (R. 58-77). Thereafter, on May 8, 1962, the court below entered an order dismissing Count I (R. 42).

Also, on May 8, 1962, at the pre-trial conference had "on all remaining issues" (R. 44) in the case, the bakeries filed with the court a motion for entry of judgment (R. 34-37) to which was attached a proposed form of judgment on Count II (R. 38-41) covering all the allegations of fact and specific prayers of the complaint, and more. The government also tendered to the court a proposed form of judgment on Count II (R. 139-142) which was different from that of the bakeries.

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[3] Count I was predicated on the alleged damages suffered by the government because of the alleged violations of the False Claims Act and was to recompense the government for such damages. Under the allegations of the indictment and of the civil complaint the government was the only party alleged to have been injured from the alleged unlawful conduct of the bakeries.

After a full discussion of Count II, the district court, effectively to utilize pre-trial procedures, ordered the government to show cause on June 14, 1962, why the court should not enter the judgment proposed by the bakeries and afforded the government an opportunity to file a "written formal reply" on or before June 1, 1962 (R. 44). Thereafter, the government failed and refused to comply with that order in that it did no more than submit a list of three objections (R. 44-45), and a memorandum (R. 45-52) in support thereof to which the government limited its oral argument on June 14, 1962 (R. 80-96).

Prior to the pre-trial hearing on June 14, 1962, the bakeries filed an amended motion for entry of judgment (R. 53-57) attaching thereto a proposed form of final judgment on Count II[4] providing even more extensive relief than that afforded by their previous proposal. At the same time, the bakeries filed an affidavit (R. 58-60) in support of the amended motion, which affidavit set forth in considerable detail the history of the settlement negotiations, the government's viewpoints and the good faith efforts of the bakeries (R. 101).

After an extensive hearing on June 14, 1962, the bakeries made one additional concession[5], thereby leaving unresolved only one substantial issue; *viz*, the injunction against conspiring to fix prices of bakery products covered only sales to the federal government, its agencies and instrumentalities, rather than to the general public as

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[4] The bakeries' proposed form of final judgment on Count II was identical to that which was subsequently entered by the court (R. 129-132) except that in paragraph V thereof it provided for only a "three" year period rather than a "five" year period.

[5] The bakeries agreed to extend from three to five years the period during which they would be required to submit formal statements of non-collusion on bids for any bakery products to any governmental agency (R. 112).

well.[6] At the conclusion of said hearing, the government declined the opportunity of a rebuttal argument (R. 111), whereupon the court granted thirty days within which the government was permitted to file a reply brief or written objections if it so desired (R. 113).[7]

Subsequently, on July 16, 1962, the government filed a reply brief (R. 120-124) which, for all practical purposes, did nothing more than to assert that the court was powerless to enter any judgment without the consent of the government.[8] At no time did the government attempt to amend its allegations of fact or specific prayers for relief.[9] Nor did the government submit any affidavits[10] or disclose any evidence in support of the broad scope of injunctive relief which, it asserted, was required by the facts alleged. Instead, the government maintained that it was not required

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[6] Henry M. Stuckey, trial attorney for the government, stated: "I think the only argument left with this new judgment, Your Honor, is the fact that the Judgment Section wants the decree to go to the general public, not just Government installations . . . ." (R. 93-94).

[7] On June 22, 1962, the district court entered an order permitting the government to file a "written reply and/or brief" on or before July 15, 1962, or "a written statement that the Plaintiff [the government] does not desire to file any such written reply or brief" (R. 120).

[8] In its reply brief, the government noted that one of the bakeries, Ward Baking Company, had been indicted in Philadelphia on June 27, 1962, on a charge of conspiring with five other bakery companies (none of the five being here involved) to fix the prices of "economy" bread sold in the Philadelphia-Trenton area (R. 124). The government has yet to disclose that Ward Baking Company was subsequently acquitted of the charge.

[9] "The plaintiff [the government] did not, in response to the order to show cause, file or attempt to file any amendments to the complaint relating to the facts upon which the injunctive relief was prayed for or to broaden the scope of the injunctive relief requested" (R. 127).

[10] The only affidavit filed by the government was that of Henry M. Stuckey, trial attorney for the government, which affidavit does not relate to the government's evidence (R. 77-78).

to disclose its evidence in response to the court's order[11] and indicated that the burden was on the bakeries to show that there was no basis for the more extensive relief demanded by the government.[12]

On December 10, 1962, the district court granted the bakeries' motion for entry of judgment (R. 125-129) and entered as its final judgment that which was previously proposed by the bakeries (R. 129-132).[13] In so doing, the court held that, on the record before it, the government's demand for including a provision whereby the injunction would relate to sales of bakery products to the general public did not have a reasonable basis and that the insistence of the government on the inclusion of such a provision constituted arbitrary and unauthorized conduct and frustrated the intent of Congress to encourage consent decrees pursuant to Section 5 of the Clayton Act (R. 128). The court further held that, on the record before it, the form of the proposed judgment tendered by the bakeries provided the government with every safeguard needed to accomplish the prevention and restraint of the violations of the Sherman Act as set forth in the complaint and that the judgment afforded all the relief that the government would be entitled to after entry of a decree *pro confesso* against each of the bakeries and after a trial on the allegations of the complaint (R. 128).

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[11] "[T]he Government was under no duty to reveal all of its evidence in answer to the rule nisi" (R. 123).

[12] "The defendants [the bakeries] have offered no proof which would justify the Court in holding that a repetition of the offense in another place with respect to other products sold by them is unlikely" (R. 49).

[13] See note 4 *supra* and accompanying text.

Summary of Argument.

The district court over the objections of the government entered a decree which did not contain an adjudication of guilt. The district court had afforded the government an opportunity to bring forth some statement or memorandum of facts which would indicate that the relief which it was seeking was not arbitrary. The government refused this opportunity apparently because it felt that the district court had no power to enter a decree not containing an adjudication of guilt unless the government consented. The government cannot be arbitrary in its dealings with private persons. The fifth amendment prohibits this where the government deprives a person of a right or where it merely proceeds arbitrarily with respect to that person. When the government in the present case refused to show by some slight statement or memorandum of facts that its conduct was not arbitrary it conceded that as to matters outside of the record its conduct was in fact arbitrary.

Section 5(a) of the Clayton Act contains a proviso which permits a defendant to capitulate to the government's substantive demands without having the effect of that capitulation used as *prima facie* evidence against him.

In this case the government attempted to deprive the bakeries of the benefit of that provision by forcing them to accept unwarranted and arbitrary provisions in the decree or else be deprived of the benefit intended by Congress in enacting Section 5(a) by subjecting the bakeries to an adjudication of guilt. The government was attempting a squeeze play to enforce its claimed arbitrary powers; it denied power in the court to act without an adjudication of guilt and it forced the bakeries to a Hobson's choice position in demanding arbitrary provisions in its proposed consent judgment. This would mean that the government could demand whatever it desired and the court would be

powerless to relieve against its arbitrary actions. Furthermore, the government's complaint did not ask for relief even as broad as that finally awarded by the district court. These factors clearly show that the government's request for broader relief was arbitrary and was used in an attempt to force the bakeries to waive the benefit afforded them by Congress.

In criminal cases a district court may accept a *nolo contendere* plea over the objection of the government and though this be done the defendant still has the benefit of the proviso. The court in civil cases should have the same discretion to enter a decree when there is actually no real factual dispute and the government seeks by arbitrary action to deprive defendants of similar "*nolo contendere* pleas" under the proviso.

Since the court had authority to enter its decree over the objection of the government, the sole question which this Court must decide is whether the district court abused its discretion in denying to the government the broader relief which it requested. It must be remembered that the government was afforded an opportunity to bring forth some statement or memorandum of facts which would justify the district court's broadening of the injunction. When the government failed to do this, it relegated itself to having the district court's discretion reviewed on the basis of the record. The district court's injunction was much broader than the alleged violation, and the government's proposed provision does not attack any specific practice of the bakeries but is merely an injunction to obey the law.

The district court in the exercise of broad equity powers could enter its decree in the pre-trial stage of the proceedings, because at that time there were no unresolved substantive issues of fact. In this situation the court is not helpless to conclude litigation and award the relief requested in the complaint and justified on the record.

ARGUMENT.

I. UNDER SECTION 5(a) OF THE CLAYTON ACT THE DISTRICT COURT LEGITIMATELY HAD THE POWER TO ENTER THE BAKERIES' DECREE BECAUSE THE GOVERNMENT'S OBJECTION TO ENTERING THAT DECREE WAS ARBITRARY.

A. The District Court had the power to test the arbitrariness of a demand by the government in consent decree negotiations.

The fifth amendment to the United States Constitution prohibits the federal government from taking property without due process of law. That amendment proscribes arbitrary action by any branch of the federal government. The Attorney General in his dealings with other citizens cannot act in an arbitrary manner because the Attorney General is an authorized representative of the federal government. The bakeries contend that in the present case the government's deliberate refusal to produce in the district court some statement, memorandum, or other summary of facts to show a reasonable basis for the demanded relief, precludes the government from objecting to the district court's exclusion of the broader injunctive provisions from the decree that was entered.

Numerous decisions of this Court have struck down arbitrary or capricious executive conduct. *United States ex rel. Accardi* v. *Shaughnessy*, 347 U. S. 260 (1954) (Attorney General's dictating decision of inferior board precluded exercise of discretion by board); *Vitarelli* v. *Seaton*, 359 U. S. 535 (1959) (Secretary did not abide by the rules which he had promulgated for governing the situation); *Wieman* v. *Updegraff*, 344 U. S. 183 (1952) (mere membership in organization as distinguished from knowing membership is arbitrary ground for exclusion

from public employment). Moreover, the prohibition against arbitrary conduct does not depend upon the existence of a right in the person against whom the executive is moving.[14]

Even the most far reaching decision from the standpoint of executive power, *Cafeteria & Restaurant Workers v. McElroy*, 367 U. S. 886 (1961), clearly reveals that the government does not have the power to act arbitrarily. In *Cafeteria & Restaurant Workers* an admiral had refused entry to a naval base to a cafeteria worker on the ground that she was a security risk after a determination to that effect by a base security officer. The Court held that the admiral had power to deny her permission to enter the base and it also held that the fact that she was not afforded a conventional trial did not offend the Constitution. The Court realistically observed that the question of whether the government had violated due process could not be answered by merely concluding that the cafeteria worker had no right of entry to the naval base, because the fifth amendment prohibited the government from adopting an arbitrary procedure to achieve a given result. *Id.* at 894-95. The Court pointed out that "the state and federal governments, even in the exercise of their internal operations, do not constitutionally have the complete freedom of action enjoyed by a private employer." *Id.* at 897-98. Moreover, the Court conceded that the cafeteria worker could not have been excluded if the grounds for her exclusion had been "patently arbitrary or discriminatory. . . ." *Id.* at 897.

The touchstone in these cases is not that the injured persons have a specific substantive right but rather that

[14] The Court in *Wieman* v. *Updegraff*, 344 U. S. 183, 192 (1952), stated that it "need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory."

they have a general right which gives them protection against arbitrary government action.[15]

Finally, the doctrine applicable to individuals is also applicable to corporations which, like individuals, are protected by the due process clause from arbitrary governmental action. See *International Shoe Co.* v. *Washington*, 326 U. S. 310 (1945); *Ohio Bell Tel. Co.* v. *Public Util. Comm'n*, 301 U. S. 292 (1937); *Terral* v. *Burke Constr. Co.*, 257 U. S. 529 (1922).

In the present case the district court ordered the government to show cause why the proposed decree should not be entered. The government could have met this order by showing a reasonable basis in fact in whatever fashion it chose. When it failed and refused to make such showing, it conceded that, with respect to matters outside the record, its action was arbitrary.

Since the Attorney General may not act arbitrarily with respect to private parties, it is the proper function of the district court to require the Attorney General to demonstrate by some reasonable method that he is not acting arbitrarily. This is as true in the enforcement of the antitrust laws as it is in other types of governmental action. It is not incumbent upon the Attorney General to prove to the satisfaction of the district court that the action he is taking is the correct action or the only action which he must take under the circumstances. The only test which the government must meet is that its action has some reasonable

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[15] The Court by recognizing a category less than a right but nevertheless protected from arbitrary government action has accommodated necessary executive prerogatives to essential "subrights." Thus a jury trial is not essential to the adequate protection of the subright, see *Cafeteria & Restaurant Workers* v. *McElroy*, 367 U. S. 886 (1961), though it would be, if a right were involved.

basis. In its brief, the government's attack on this point is misplaced because it argues that the district court may not consider whether the Attorney General has made an erroneous decision. Brief for Government, p. 31. In this case the bakeries contend that the district court was not seeking to judge the correctness of the government's decisions but was attempting merely to ascertain whether its demands were arbitrary in light of the record and facts which it could state that it could prove.

No trial on the merits is necessary to test arbitrariness. The order of the district court in this case did not cut off the presentation of the government's case. Instead, it sought in effect to determine whether the government had a case on the further relief demanded. The government could have shown by a fact memorandum or other means that there was a reasonable basis for the further relief it sought, and with such showing, if the bakeries continued in their refusal to consent to the further relief, a trial on the merits would have been justified. The government could not or would not bring forth the slightest factual basis by which the government might show that its request was not arbitrary. The district court cannot present the government's case for it.

The government contended that it had unfettered discretion as to the conduct of the litigation and refused to bring forth any showing of a reasonable basis for its demand. The district court therefore was justified in entering the decree proposed by the bakeries. In its order the district court stated:

> The demand of the plaintiff as to the inclusion of two controversial provisions in its tendered judgment does not have a reasonable basis under the circumstances here present. The insistence of the plaintiff on the inclusion thereof constitutes arbitrary and

unauthorized conduct in view of the intent of Congress to encourage consent decrees pursuant to Section 5 of the Clayton Act and thus avoid a costly and protracted trial for the parties (R. 128).

As an illustration of the ramifications of a result which concedes to the government unlimited discretion, it may be shown that it would be possible for the Attorney General to institute and force to trial antitrust suits against any corporation doing business in interstate commerce in the United States and thereby impose upon that corporation and its stockholders undue financial burdens if it were not able to or were not afforded a forum in which it might test the good faith of the government's action. Moreover, the Attorney General, if he so chose and if there were no proscription upon his discretion, could single out and harass certain corporations and file numerous unwarranted antitrust actions against them.

The government was obliged to show that its demands were not arbitrary. It refused to do so on the theory that it had unlimited discretion in the handling of antitrust cases. By its refusal to indicate that its action was not arbitrary it perforce conceded that nothing outside the record in this case could justify its demand.

B. The government's demand for a broader injunctive provision than was prayed for in its complaint was arbitrary and unlawful in view of the record in this case.

The government refused to bring forth any facts which would show that the relief it was seeking was not arbitrary.[15a] Consequently, it must be concluded that no facts

[15a] There was no limitation in the court's order to show cause, which order called upon the government to show (1) why the court could not legally enter the judgment, a question of power, and (2) why it should not do so on the record, a question of the exercise of the court's power. See also the argument at the June 14, 1962 hearing (R. 106-107).

existed outside the record which could justify its demand for broader relief. Furthermore, the record in the case does not justify the government's demands for there was no showing of a triable issue on the demands, and therefore, even taking the facts in the complaint as admitted the district court properly concluded that the government's request was not only arbitrary but it was also unauthorized (R. 128).

Section 5(a) of the Clayton Act serves a twofold purpose. First, it encourages treble damage actions by giving to small claimants the benefit of the government's investigative and trial resources by providing those claimants with a judgment which will establish a *prima facie* case. Second, it encourages antitrust violators to capitulate by refusing to extend the *prima facie* effect of the judgment where there has been such a capitulation. See *Commonwealth Edison Co.* v. *Allis-Chalmers Mfg. Co.*, 5 TRADE REG. REP. (1963 Trade Cas.) ¶70884 (7th Cir. Sept. 12, 1963).

There are numerous cases holding that the government cannot force the waiver of a constitutional right by conditioning some governmental benefit upon the nonexercise of that right. It is clear that the government cannot condition the continuance of an individual's state employment on the waiver of a constitutional right, even though the individual does not have a constitutional right to that employment. See *Slochower* v. *Board of Educ.*, 350 U. S. 551 (1956).

The government could not impose an unconstitutional condition upon a private party in a consent decree context. Similarly, the government may not impose a condition which is illegal because it achieves in a given situation a result opposite to that decreed by Congress, and deprives the defendant of a benefit afforded by Congress. In short, the government may not rewrite the statute to eliminate

a sanctuary explicitly granted to antitrust violators by Congress. This is precisely what the government attempted and the district court rejected in *United States* v. *Brunswick-Balke-Collender Co.*, 203 F. Supp. 657 (E. D. Wis. 1962), a case which is substantially indistinguishable from the present case.

There the government sought an injunction against violations of Sections 1 and 2 of the Sherman Act. The defendants filed a motion for entry of a judgment against them. 203 F. Supp. at 660. The government did not object to the enforcement terms of the decree, but demanded that the decree contain provisions whereby the defendants would admit the charges against them and in which they would agree "to an adjudication that they had violated Section 1 of the Sherman Act as charged, which adjudication would be prima facie evidence against them in [certain] treble damage suits. . . ." *Id.* at 660. The district court characterized the government's withholding of its consent as not only arbitrarily denying the moving defendants the right to capitulate but also "frustrating the clear intent of Congress to encourage early entries of injunctional decrees without long and protracted trials." *Id.* at 662.[16]

In *Brunswick* the government's stategy was obvious. Although Congress had decreed that a consent judgment would not have *prima facie* effect, the government sought to give the judgment that effect by attempting to withhold its consent, thus forcing the defendants to waive their statutory right. Apparently the government believed that it could arbitrarily refuse to consent even though there

[16] Apparently Judge Wyzanski in *United States* v. *Asphalt & Petroleum Co.*, believed that the court had the power in the exercise of its discretion to enter a decree granting all substantive relief but denying an adjudication of guilt. See Dabney, *Consent Decrees Without Consent*, 63 COLUM. L. REV. 1053, 1059-60 (1963).

were no disputed issues and thus compel the defendants to waive the benefit of the proviso. This conduct was not merely arbitrary; it was unlawful.

In the case at bar the tactics of the government while less direct are perhaps more sophisticated. Obviously the government's primary purpose was to extract from the bakeries an adjudication of guilt or to force them to accede to arbitrary injunctive provisions not warranted by the record and to which the government clearly would not be entitled after a trial on the merits. In its first brief filed in opposition to a motion for entry of a consent judgment, the government listed its objectives in the following order: an adjudication of guilt, public exposure of the bakeries and their officials, and broader injunctive relief (R. 47-48). Moreover, in the government's final brief it candidly conceded that "if the defendants are willing to admit the charge, the Government would have to be satisfied with the relief which the Court would, on the basis of the pleadings, deem appropriate, subject to its right to appeal" (R. 123). Furthermore, the government in its complaint merely requested an injunction prohibiting price fixing with respect to bread and rolls to naval installations in the Jacksonville area (R. 8). Subsequently, the bakeries consented to extending the scope of relief to include sales of all bakery products to all federal installations wherever located. Nevertheless, the government in an attempt to obtain an arbitrary and unwarranted injunction over the activities of a considerable portion of the baking industry, again extended its injunction request to include a broad injunction to obey the law. This is arbitrary conduct.

Thus, the government, unwilling to find itself again in a situation similar to that in *Brunswick*, took the position that it wanted broader substantive relief than that justified by the pleadings for the purpose of forcing the bakeries into

accepting an adjudication of guilt thereby depriving them of any salutary effect afforded by the Section 5(a) proviso, or of accepting arbitrary injunctive provisions.[17] The government hoped to achieve its desired ends in cases similar to the present case by adopting a method less blatant than that chosen in *Brunswick*.

In *Brunswick* the court was faced with a situation in which the parties had resolved all of the issues in the case; and the government's insistence on an adjudication of guilt, which would deprive the defendants of the benefit of the statutory proviso, dramatically revealed a conflict between Congress and the Attorney General. Superficially the present case would not seem to fit the *Brunswick* mold and therefore might appear more innocuous, for the government in the present case has placed the litigation in a posture which at first glance does not appear to present as obvious an illustration of legislative-executive clash as does *Brunswick*. Actually, however, the two cases are substantively indistinguishable because in the present case the government, rather than find itself in the position of refusing to consent to a decree where there were in fact no unresolved issues, deliberately attempted to hold out an issue under the guise that it was genuine and still unresolved.

It must be remembered that the government's unamended complaint did not ask for relief even as broad as that acceded to by the bakeries in their proposed judgment. The government has in effect assumed three separate positions on the question of the scope of the injunctive provision. Its last position, a demand that the injunction prohibit price

[17] In *United States* v. *National City Lines, Inc.*, 134 F. Supp. 350, 356 (N. D. Ill. 1955), the court recognized that when the government is the plaintiff in an antitrust suit "elemental fairness" demands that the issues respecting injunctive relief "be determined with reliable certainty by the pleadings" because unlike a private case where the interests are limited the government's interest is as wide as the national economy.

fixing to the general public, is not only a geographical expansion but also a customer expansion which goes far beyond the alleged violation of price fixing to naval installations in the Jacksonville area.

In the present case the government consciously refused to make a showing which would establish its demands as at least reasonable.[18] The government is holding out for relief not justified by the pleadings or the record. Based on the pleadings and the record which shows no disputed facts or triable issues, it must be deemed adequate because it far surpasses the allegations and the prayer for relief. What the government might have shown is irrelevant because by deliberate default it is restricted to the pleadings and the record established in the court below.[19]

The government has used the device of asking for relief greater than that justified by the pleadings and the record in refusing to consent to the decree in an effort to camouflage the arbitrariness of its action as manifested in *Brunswick*. The bakeries maintain that there is no difference in substance between the government's refusal without excuse to consent in *Brunswick* and its refusal to consent in the present case where the excuse is merely that it is not satisfied with the scope of relief when the relief exceeds that prayed for in the government's complaint. The plain fact

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[18] In its brief the government states that "there is nothing in the language, legislative history, or basic policy of Section 5 which in any way suggests that it was intended to limit the Attorney General's broad discretion to determine the kind of final injunction that the government will accept without a trial." Brief for Government, p. 29. The government's attitude indicates that it intentionally failed to comply with the show cause order so as to avoid any appearance of conceding the fact that its consent decree program is, to any degree, subject to review by the judiciary.

[19] The government by attaching to its brief the indictment in Case No. 11676J, Brief for Government, pp. 35-40, suggests that the record as made in the court below does not justify their demand for broader relief. In this regard it should be noted that Derst Baking Company was not a defendant in that action.

is that the government's excuse for not consenting in this case is merely one with superficial attractiveness. In reality the government has no legitimate excuse. Thus, in the present case as in *Brunswick* the government seeks to write the proviso out of the statute by the use of government power, and the district court as in *Brunswick* refused to sanction that conduct.

C. The District Court may in its discretion enter a decree under Section 5(a)[2] over the objection of the government in a manner similar to the acceptance by it of a plea of *nolo contendere*.

The action by the district court in the case at bar in entering the decree over the objection of the government is analogous to the acceptance of a plea of *nolo contendere* over the objection of the government. In both situations the district court is making an accommodation between dual statutory purposes.

The *prima facie* evidence portion of Section 5(a) was intended by Congress to save private litigants time and expense. *Emich Motors Corp.* v. *General Motors Corp.*, 340 U. S. 558, 568 (1961). The proviso was intended to aid antitrust enforcement by encouraging capitulation by defendants in order to avoid the *prima facie* evidence rule. "Both purposes of Section 5(a) and its proviso serve the broad objective of anti-trust enforcement, and although the two purposes are distinct, '. . . an accommodation must be made to preserve the essence of both.'" *Commonwealth Edison Co.* v. *Allis-Chalmers Mfg. Co.*, 5 TRADE REG. REP. (1963 Trade Cas.) ¶70884, at 78556-57 (7th Cir. Sept. 12, 1963).[20] The district court in the exercise of its discretion

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[20] See also *Northern Pac. Ry.* v. *United States*, 356 U. S. 1, 4 (1958); *Karseal Corp.* v. *Richfield Oil Corp.*, 221 F. 2d 358 (9th Cir. 1955); and *Kinnear-Weed Corp.* v. *Humble Oil & Ref. Co.*, 214 F. 2d 891, 893 (5th Cir. 1954).

must accommodate the dual purposes of Section 5(a) with the broader purpose of antitrust enforcement.[20a]

The rejection or acceptance of a *nolo contendere* plea by a district court in a criminal antitrust action is an example of such an accommodation. A district court can accept a plea of *nolo contendere* over the objection of the government, see FED. R. CRIM. P. 11, and such a judgment comes within the terms of the proviso.[21] Since the judgments contemplated by the proviso include those in both criminal and civil cases, see *Commonwealth Edison Co.* v. *Allis-Chalmers Mfg. Co., supra.*, it is logical that the same discretion be vested in the district court where a defendant wishes to capitulate in a civil action without coming under the *prima facie* rule. Here, as in the criminal case, the district court in the exercise of its discretion must weigh the respective values of the purposes of Section 5(a). If it deems the avoidance of the *prima facie* rule to be the best means in a particular case to effectively enforce the antitrust laws, it should enter a "consent" decree over the objection of the government. If it deems that the *prima facie* rule should be invoked, it should refuse to enter such a decree and permit the case to be tried. The analogy to the *nolo contendere* situation is obvious.

If this could not be done, the government could always file a companion civil suit virtually identical to the indictment as was done in the present case, refuse to consent to a decree, and thus force the defendant to accept a pro-

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[20a] Only one of the dual purposes need be considered in the present case since an adjudication of guilt could not possibly aid private litigants. The complaint related only to sales to a governmental agency and, based on the pleadings, the only recoverable damages were paid upon settlement of Count I.

[21] See *Twin Ports Oil Co.* v. *Pure Oil Co.*, 26 F. Supp. 366 (D. Minn. 1939), *aff'd*, 119 F. 2d 747 (8th Cir.), *cert. denied*, 314 U. S. 644 (1941). See also *Pfotser* v. *Aqua Systems, Inc.*, 162 F. 2d 779, 784 (2d Cir. 1947) (L. Hand, J.).

vision which eliminates the benefit of the proviso, thereby depriving the defendant of the very thing which prompted him to plead *nolo contendere* in the criminal case.

There may be cases in which private parties and the government are in honest disagreement as to the terms of a consent decree and, therefore, both are willing to go to trial. Where the defendant does not agree to the inclusion in the consent decree of relief clearly warranted by the complaint or the record, he may not get the benefit of the proviso, and a trial is warranted. Where, however, the defendant does agree to the inclusion in the consent decree of the relief warranted by the complaint or the record, and the government demands further relief not so warranted in an attempt to force the defendant to give up the benefit of the proviso, the district court may step in and make an accommodation. If the government is indeed arbitrary, the decree should be entered; if it is not, the case should be tried. The determination is within the discretion of the district court. Any other result would remove from the district court its power to protect the intent of Congress and its discretion to exercise its equity power prior to trial, and would vest that power and discretion in the government. The government would be able to prevent the exercise of the district court's power by holding out a sham issue as unresolved. Judicial discretion must never be encroached upon by the executive. The judiciary must retain its full power so that it may afford relief against arbitrary conduct, to insure that a defendant will not be put to a "Hobson's Choice."[22]

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[22] "[T]his court sitting as a court of equity is not powerless under such circumstances to afford the defendants a form of relief other than the Hobson's choice of either further capitulating to an arbitrary and unauthorized demand of the Government or undergoing the ordeal of a costly and protracted trial." *United States v. Brunswick-Balke-Collender Co.*, 203 F. Supp. 657 (E.D. Wis. 1962).

D. The action of the District Court enhances antitrust enforcement.

Public policy favors the action of the district court, and antitrust enforcement will benefit by it. Aside from the conflict between the constitutional branches of the government and from the repugnance of arbitrary governmental action, it is necessary to insure that the antitrust laws are properly enforced. The government cannot honestly claim that it needs the right to act arbitrarily with no judicial review in the area of consent judgments in order properly to enforce the antitrust laws. No enforcement agency may exercise such unfettered power under the guise of law enforcement.

An easy and apparently plausible argument may be made that a decree which ends antitrust litigation without trial, and includes an adjudication of guilt, would be effective in antitrust enforcement because it both ends the violation and affords treble damage plaintiffs the *prima facie* rule. However, the flaw in this argument is that such decrees would in truth have the opposite effect. Defendants, no longer able to benefit by the proviso, would be much more inclined to fight to the end in an attempt to avoid the treble damage liability. Accordingly, consent decrees would be correspondingly more difficult for the government to obtain. The courts would be forced to try significantly more "big", protracted cases, and the government, without inordinate expenditure of public funds, would be unable to reach as many violations. By its overemphasis on the benefits to private plaintiffs, the government is lessening its effectiveness in the area of enforcing the over-all intent of the antitrust laws, to preserve "free and unfettered competition as the rule of trade."[23]

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[23] *Northern Pac. Ry.* v. *United States*, 356 U. S. 1, 4 (1958). A government attorney has made similar observations, and has concluded that the congressional sanction of the consent decree

It has been urged that the government should demand whatever relief its bargaining position may coerce. "[T]hat view ignores the prosecutor's responsibility to stay within statutory and constitutional bounds. It threatens our goal of equitable law enforcement and, accordingly, should be rejected." ATT'Y. GEN. NAT'L COMM. ANTITRUST REP. 361 (1955).

II. THE SUPREME COURT'S REVIEW IN THIS CASE IS MERELY ONE OF REVIEWING THE DISTRICT COURT'S DISCRETION AND THE GOVERNMENT HAS NOT SHOWN THAT THE COURT HAS ABUSED ITS DISCRETION; NOR HAS THE GOVERNMENT SHOWN THAT IT HAS BEEN LEFT WITHOUT A REMEDY BECAUSE THE DISTRICT COURT HAS EXPRESSLY RETAINED JURISDICTION OF THE CASE.

The first part of this brief demonstrated that the district court had the authority to enter over the government's objection a decree which did not contain an adjudication of guilt. Therefore, the only question remaining in this case is whether the district court abused its discretion in entering a decree without trial in which the scope of relief is less than that demanded by the government.[24] The district

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"has made possible a greatly increased coverage of the field of antitrust violations and thereby has helped private plaintiffs." Timberg, *The Antitrust Laws From the Point of View of a Government Attorney*, 1 HOFFMAN'S ANTITRUST LAW AND TECHNIQUES 165 (1963).

[24] In its brief the government concedes that the court has some authority, before trial, to determine if anything could be developed under an offer of proof which could possibly justify additional relief. Brief for Government, p. 12. The government's concession, however, is conditioned on there being an adjudication of guilt, but this condition apparently stems from the government's notion that the district court has no authority to enter a consent decree over the objection of the government. The bakeries contend and have demonstrated in part one of this brief that the court has such authority.

court in affording the government an opportunity to show that its demands were not arbitrary also afforded the government the opportunity to justify the broader scope of relief which it requested. In refusing to come forth with some type of statement or memorandum of facts the government, by necessity, relegated itself to attacking the district court's discretion as it was exercised in light of the pleadings and the record, and not upon what it might have proved if the case were tried.[25] The principles of elemental fairness demanded that the bounds of the issue relating to injunctive relief be determined with reasonable certainty by the pleadings. See *United States* v. *National City Lines, Inc.*, 134 F. Supp. 350, 356 (N. D. Ill. 1955).

This Court has recognized the "wide range of discretion in the District Court" to adapt its decree in Sherman Act cases to the particular case before it and has stated that the Court "will not direct a recasting of the decree except on a showing of abuse of discretion."[26] In numerous instances this Court in antitrust cases has refused to modify the district court's decree because the drafting of the decree is left to its discretion.[27] Because the review

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[25] In *United States* v. *W. T. Grant Co.*, 345 U. S. 629 (1953), the Court refused to find an abuse of discretion in not enjoining future violations because the complaint alleged no threatened violations, and the government in not accepting the opportunity to file affidavits or amend its complaint was restricted to its complaint.

[26] *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 185 (1944). See *Timken Roller Bearing Co.* v. *United States*, 341 U. S. 593 (1951). The purpose of an injunction in a Sherman Act case is not to punish the defendant. *International Salt Co.* v. *United States*, 332 U. S. 392, 401 (1947). It is to prevent continued or future violations of the Sherman Act. *United States* v. *National Lead Co.*, 332 U. S. 319, 335 (1947). The test of the success of a civil suit is whether it effectively pries "open to competition a market that has been closed by defendants' illegal restraints." *International Salt Co.* v. *United States*, *supra*, at 401.

[27] See, *e. g.*, *Maryland & Virginia Milk Producers Ass'n*, v. *United States*, 362 U. S. 458 (1960); *International Boxing Club* v. *United States*, 358 U. S. 242 (1959); *United States* v. *W. T.*

is of the district court's discretion, the government "must demonstrate that there was *no reasonable basis* for the District Judge's decision." *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 634 (1953). (Emphasis added.)

An analysis of the Court's decisions in this area reveals some perceptible guidelines by which the Court may discover whether there has been in fact an abuse of the district court's discretion. The key to these cases is the concept of specificity. The Court has said that "the precise practices found to have violated the act should be specifically enjoined." *Schine Chain Theaters, Inc.* v. *United States*, 334 U. S. 110, 126 (1948).

It is one thing to enjoin specific acts which while not themselves illegal may, when combined with others, violate the act; it is another to enjoin conduct proscribed by the statute itself. The utility of enjoining specific conduct which is not in itself objectionable is apparent because such an injunction is the only method by which those acts may be legally proscribed. Thus, in a situation where the defendant has used many arrangements which collectively have caused it to violate the law, it would be depriving the government of essential antitrust enforcement tools not to enjoin some of those practices which in themselves are not objectionable. However, there is little usefulness in framing a decree in the language of the statute except for the advantage of having possible contempt proceedings as an additional element of deterrence. In one dramatic instance the Court overturned a district court's injunctive

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Grant Co., 345 U. S. 629 (1953); *United States* v. *National Lead Co.*, 332 U. S. 319 (1947); *Associated Press* v. *United States*, 326 U. S. 1 (1945). Admittedly, the relief granted by the district court can exceed the proven violation, but this Court has pointed out that when this is done, the Court must "be especially wary lest the trial court overstep the correspondingly narrower limits of its discretion...." *International Boxing Club* v. *United States*, 358 U. S. 242, 262 (1959).

provision because it was too broad and was in fact framed almost in the exact language of the statute.[28]

There are certain standard remedies which are generally acceptable to the Court. Thus, where there is a Section 2 Sherman Act offense, the Court will require the district court's decree to provide for divestiture.[29] In other cases the Court has ordered modification of the district court's decree to prohibit specific commercial conduct generally lawful in itself which the Court deems to be a necessary ingredient of the violation[30] or to grant specific injunctive relief necessary to police future conduct.[31] In complex patent cases, although the requirement for overturning the district court's discretion is that the Court must find an abuse of that discretion, the tests or criteria for finding such abuse are not as clear as in other types of cases.[32]

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[28] In *Schine Chain Theaters, Inc.* v. *United States*, 334 U. S. 110, 125-26 (1948), the Court required the district court to re-examine a decree provision against monopolizing first and second run films because "public interest requires that a more specific decree be entered on this phase of the case."

[29] See *United States* v. *E. I. duPont deNemours & Co.*, 366 U. S. 316 (1961); *International Boxing Club* v. *United States*, 358 U. S. 242 (1959); *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131 (1948). In one case where there was no Section 2 violation, the Court eliminated a provision in the decree requiring divestiture. *Timken Roller Bearing Co.* v. *United States*, 341 U. S. 593 (1951).

[30] See *United States* v. *Loew's, Inc.*, 83 S. Ct. 97, 106-08 (1962).

[31] See *United States* v. *United States Gypsum Co.*, 340 U. S. 76, 95 (1950); *United States* v. *Bausch & Lomb Optical Co.*, 321 U. S. 707 (1944).

[32] In *Hartford-Empire Co.* v. *United States*, 323 U. S. 386 (1945), the Court relaxed a great number of stringent injunctive provisions imposed by the district court. However, in *United States* v. *National Lead Co.*, 332 U. S. 319 (1947), the Court refused to modify any of the numerous restrictive provisions of the district court's decree, and in *United States* v. *United States Gypsum Co.*, 340 U. S. 76 (1950), the Court both granted and refused to grant some of the government's requests for modification of the district court's decree. In short, the patent cases seem to have limited utility from the standpoint of ascertaining criteria which indicate an abuse of discretion, outside of the patent field.

The government relies heavily on *United States* v. *Hartford-Empire Co.*, 1 F.R.D. 424 (N.D. Ohio 1940). There the district court refused to enter a decree, denominated by one of the defendants as a "consent decree," proposed in a pre-trial conference. The case is easily distinguishable from the present case. The district court in *Hartford-Empire Co.* did not utilize the procedure of allowing the government to make a proffer of proof and have the relief provisions of the decree either fashioned upon the proffer, or after the proffer have the government present its evidence in a hearing.[33]

In the case at bar, the district court in its decree expressly retained jurisdiction (R. 132). This Court has repeatedly emphasized the prophylactic effect of the retention of jurisdiction by the district court.[34]

The main thrust of the government's attack on the formulation without evidence of a decree by the district court does not meet the issue presented in this case. The government takes the position that the district court cannot fashion appropriate relief unless evidence is produced from which the district court may gather facts necessary for the exercise of its discretion. Brief for Government, p. 13-19. However, the government assumes that the only method

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[33] Actually *Hartford-Empire Co.* presents a dramatic vindication of the procedure used by the district court in disposing of the present case. When *Hartford-Empire Co.* finally reached the Supreme Court there had already been a trial which had lasted 112 days, a district court opinion comprising 160 pages including 628 findings of fact and 89 conclusions of law, a 46-page decree and a 16,500 page record. *Hartford-Empire Co.* v. *United States*, 323 U. S. 386, 392 (1945).

[34] See *Lorain Journal Co.* v. *United States*, 342 U. S. 143, 156-57 (1951); *International Salt Co.* v. *United States*, 332 U. S. 392 (1947); *Associated Press* v. *United States*, 326 U. S. 1 (1945). In *Associated Press* v. *United States*, *supra*, at 22-23, this Court stated that if the decree "should not prove adequate to prevent further discriminatory trade restraints... the court's retention of the cause will enable it to take the necessary measures to cause the decree to be fully and faithfully carried out."

of producing evidence is by a trial. This is not true. Evidence can be produced upon affidavits, by the pleadings, or in a memorandum or statement of facts to be proved. See *United States* v. *United States Gypsum Co.*, 340 U. S. 76, 86 (1950). In the present case the government had an opportunity to produce this evidence; it chose not to do so. The point is, however, that the district court cannot litigate the government's case and litigation must come to an end.

III. THE BROAD REMEDIAL POWERS OF AN EQUITY COURT SUPPORT THE DECISION BELOW AND CANNOT BE RESTRICTED BY THE GOVERNMENT.

That the district court may test arbitrariness and enter an appropriate decree is consistent with the historical and natural powers of equity jurisprudence and the *Federal Rules of Civil Procedure.*

There can be no serious question that in deciding injunction cases, the equity court has traditionally enjoyed very broad remedial powers. The landmark case of *Hecht Co.* v. *Bowles*, 321 U. S. 321 (1944), clearly establishes the wide range of equity powers in injunction cases. Equitable remedies are distinguished by their flexibility, unlimited variety, adaptability to circumstances and the natural rules which govern their use. See POMEROY, EQUITY JURISPRUDENCE §109 (5th ed. 1941). Notwithstanding the fusion of law and equity by the *Federal Rules of Civil Procedure*, the substantive principles of equity remain unaffected. *Stainback* v. *Mo Hock Ke Lok Po*, 336 U. S. 368, 382 (1949).

The district courts have increasingly used the pre-trial procedures to determine the issues. In the *Handbook of Recommended Procedures for the Trial of Protracted Cases* adopted by the Judicial Conference of the United States in March 1960, there is a recommendation that in civil anti-

trust suits brought by the government one or more pre-trial conferences should be devoted to the question of the relief sought by the plaintiff.[35] The *Handbook*, in discussing that recommendation, suggests that a pre-trial discussion be held to determine what relief would be appropriate were the allegations of the complaint proved in their entirety, with a view that discussions of this type made at pre-trial may dispose of the case without trial. It cites with approval the case of *United States* v. *Standard Oil Co.*, 1958 Trade Cas., ¶69212 (S. D. Cal. Oct. 31, 1958), where the court held a pre-trial hearing at which counsel were requested to assume that the case had been tried as to liability and that the court had sustained the allegations of the complaint. The question was then posed as to whether the court could, should or would grant divestiture of the defendants' marketing facilities as part of the relief granted. Counsel were asked to submit by briefs the relevant facts to be used as a basis for their showing and argument. After hearing and before trial, the district court ruled that it would not grant the government's prayer for relief requesting divestiture of the marketing facilities.[36]

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[35] See 25 F. R. D. 398. See generally *Seminars On Protracted Cases for United States and District Judges*, 23 F. R. D. 319, 21 F. R. D. 395; *The Report on Procedure in Anti-Trust and Other Protracted Cases Adopted by the Judicial Conference of the United States*, 13 F. R. D. 62.

[36] The court stated at p. 74764:

> Well, to get down to the problem of what type of relief the Court could grant in this case. I have come to the conclusion that if this case were tried and the defendants were shown to have been in conspiracy to restrain trade and commerce and to monopolize, and assuming the showing made by the defendants as made in this hearing this week, and assuming also the validity of certain matters mentioned by Mr. Lehman [government counsel]—such as irregularities, misconduct, activities since 1950—that this Court should not and would not grant divestiture or divorcement of these service stations.

See also *United States* v. *Aero Mayflower Transit Co.*, 1956 Trade Cas., ¶68526 (S. D. Ga. Sept. 20, 1956).

Obviously, pre-trial procedures would be useless if litigants were permitted to reveal or conceal at their pleasure. To effectuate the procedures litigants are required to cooperate with the court. Indeed, the parties at a pre-trial conference "owe a duty to the court and opposing counsel to make a full and fair disclosure of their views as to what the real issues at the trial will be."[36a] This duty, of course, applies to the federal government just as it does to private litigants. *E.g., Daitz Flying Corp.* v. *United States*, 4 F. R. D. 372, 373 (E.D.N.Y. 1945), *rev'd on other grounds*, 167 F. 2d 369 (2d Cir. 1948).

In the present case the government was given an opportunity to make a record upon which the court could exercise its judgment. The government failed to add to the record and the court was authorized to enter the decree at pre-trial upon the record then before it.[37] The court had the

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[36a] *Cherney* v. *Holmes*, 185 F. 2d 718, 721 (7th Cir. 1950). A party may not stand pat at pre-trial on general statements of claimed issues for trial. *Package Mach. Co.* v. *Hayssen Mfg. Co.*, 164 F. Supp. 904, 910 (E. D. Wis. 1958), *aff'd*, 266 F. 2d 56 (7th Cir. 1959); *United States* v. *Maryland & Virginia Milk Producers Ass'n.*, 22 F. R. D. 300, 302 (D. D. C. 1958).

[37] See *Syracuse Broadcasting Corp.* v. *Newhouse*, 271 F. 2d 910 (2d Cir. 1959) (court approved forceful use of pre-trial to define issues); *Mascuilli* v. *United States*, 188 F. Supp. 754 (E. D. Pa. 1960) (court has authority to eliminate issues at pre-trial where admitted facts show no reasonable basis for trial of the issue); *Package Mach. Co.* v. *Hayssen Mfg. Co.*, 164 F. Supp. 904, 910 (E. D. Wis. 1958), *aff'd*, 266 F. 2d 56 (7th Cir. 1959) (plaintiff may not rely solely on general factual statements in complaint); *American Mach. & Metals, Inc.* v. *De Bothezat Impeller Co.*, 82 F. Supp. 556 (S. D. N. Y. 1949) (pre-trial order may pass judgment upon the legal sufficiency of a defense); *Lane* v. *Brown*, 63 F. Supp. 684 (E. D. Mich. 1945) (where no valid service of process, the district court was authorized at a pre-trial hearing to proceed to judgment); *Silvera* v. *Broadway Dep't Store, Inc.*, 35 F. Supp. 625 (S. D. Cal. 1940) (court has power at pre-trial to dismiss when the facts admitted and proof show no cause of action). "Since the parties at pre-trial conference agreed upon all necessary and relevant facts and exhibits, a decision on the merits may be entered without formal trial." *Newman* v. *Granger*, 141 F. Supp. 37, 39 (W. D. Pa. 1956), *aff'd per curiam*, 239 F. 2d 384 (3d Cir. 1957); *Holcomb* v. *Aetna Life Ins. Co.*, 225 F. 2d 577 (1st Cir. 1958).

power to do this.[38]

The district court found that since the government's inclusion of the controverted provisions had no basis in fact, it clearly represented an attempt to force the bakeries to admit guilt, thus depriving them of the benefits of Section 5(a), or else to accede to arbitrary and unwarranted demands. The court, as a court of equity, could afford relief against such arbitrary conduct and relieve private litigants placed in a Hobson's choice position.

To sanction the refusal of the government to respond to the order to show cause would also impair the pre-trial procedures utilized by the trial courts in determining the triable issues, and in using summary proceedings to dispose of cases without trial where the facts are undisputed and there are no triable issues.[39]

CONCLUSION.

For the reasons set out in this brief the decision of the district court should be affirmed.

Respectfully submitted,

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[38] In this case the allegations of the complaint were to be construed as true and since no other facts were brought to the court's attention, there was no issue of fact to be resolved at the trial. Therefore, absent any triable issue, the cases cited on p. 27 of the government's brief are not controlling or applicable here. Most of those cases were jury cases (unlike this equity case) and the courts deciding them made their decisions on the bases that they presented conflicting facts and thus triable issues which the trial courts could not resolve.

[39] *United States* v. *W. T. Grant Co.*, 345 U. S. 629 (1953). See also cases cited note 37 *supra*.

CERTIFICATE OF SERVICE.

I, CHARLES L. GOWEN, of counsel in the above case, acting on behalf of all of appellees herein and as a member of the Bar of the Supreme Court of the United States, hereby certify that on the day of October, 1963, I served copies of the foregoing Brief for Appellees upon appellant, the United States of America, by mailing three copies thereof to Lionel Kestenbaum, Esq., Department of Justice, Washington 25, D. C., and by mailing a copy thereof to Archibald Cox, Esq., Solicitor General, Department of Justice, Washington 25, D. C. Each of the foregoing was sent by Air Mail postage prepaid.

Attorney for American Bakeries Company, acting on behalf of the said client, and other appellees named in the foregoing Brief.